

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period

April 1, 1947

Through June 30, 1947

Volume No. 47

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1947, through June 30, 1947.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

**QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
For the Period April 1, 1947
Through June 30, 1947**

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OPINIONS

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April 2, 1947.

Hon. J. G. Kimbrough,
Probate Judge and Ex-Officio Chairman,
Court of County Commissioners,
Washington County,
Chatom, Alabama.

Court of County Commissioners—Public Health—Title 12,
Section 12, Subsection 19, Code of Alabama 1940.

1. Under the provisions of Title 12, Section 12, Subsection 19, Code of Alabama 1940, court of county commissioners or other governing body of the county may appropriate funds, when requested so to do by the State Board of Health, to promote or enforce the health and quarantine laws of the State for the benefit of the county and its inhabitants.

2. Such funds may be used in spraying privately owned homes with DDT.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, dated March 11, 1947, is as follows:

"On January 13, 1947, the Court of County Commissioners of Washington County, Alabama, by a resolution spread upon its Minutes, found on page 262, Vol. 'Q', appropriated the sum of \$1,890.00 for the purpose of spraying with DDT some 1210 houses located in Beats 2, 7, 8, 9, 10, and 11 of this County, said Beats having been excluded from the 1947 program by the U. S. Public Health Service, operating through the State Department of Health, by a curtailment of the funds, materials and equipment heretofore used for such purposes in 1946, but before signing any warrants payable out of this appropriation, I wish to ascertain from you the following facts:

"1. Is it legal for the governing body of Washington County, Alabama, to appropriate and spend County funds directly for the purpose of spraying, with DDT, any private homes owned by any individual, association or corporation, if located within Washington County, Alabama?

"2. Is it legal for the governing body of Washington County, Alabama, to appropriate and spend county funds for the purpose of spraying, with DDT, any private homes owned by any private individual, association, or corporation, located in Washington County, if such a program is sponsored by the State Board of Health or by the Federal Government, in co-operation with the State Board of Health?"

In addition to your request, I have had correspondence with Dr. D. G. Gill, State Health Officer, and from this correspondence it appears: (1) That during the year 1946, the United States Public Health Service furnished funds, materials and supplies to the State Department of Health to be used in spraying privately owned homes in the State with DDT; (2) that for the year 1947, the United States Public Health Service has reduced its contribution of these funds, materials, etc., in an appreciable amount, thus reducing the number of homes which the State Department of Health can spray with DDT; and, (3) that the State Department of Health has called upon Washington County to supplement the funds allotted to it by the United States Public Health Service so that all of the homes in Washington County may be sprayed with DDT during the year 1947, the amount requested by the State Department of Health from your County being the sum of \$1,890.00.

For the purpose of convenience, I will answer your questions in inverse order.

My answer to your second question is in the affirmative.

Your attention is directed to Title 12, Section 12, Subsection 19, Code of Alabama 1940, which reads as follows:

"12. The court has authority:

"19. To appropriate money to promote or enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants, when requested so to do by the state board of health."

The above quoted subsection is plain, clear and unambiguous in that it authorizes the county governing body of the county to appropriate money to promote or enforce the health and quarantine laws of the State when requested so to do by the State Board of Health.

It also appears from the correspondence this office has had with Dr. Gill that the purpose of spraying privately owned homes with DDT is for the control of mosquito and fly-borne diseases, thus showing that the State Department of Health is calling upon your County to appropriate money for the enforcement and promotion of the health laws of the State.

Dr. Gill also sent to this office a copy of the resolution adopted by your Court of County Commissioners, under date of February 11, 1947, whereby the sum of \$1,890.00 was appropriated for this purpose.

You are, therefore, advised that, in view of Title 12, Section 12, Subsection 19, *supra*, this resolution is proper, and, you, as Judge of Probate, are authorized thereby to draw your warrant in that amount.

As it appears from your request and the correspondence with the

State Health Officer, that the money is to be used in cooperation with the State Health Department, it is not necessary that I answer your first question.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 3, 1947.

Mr. W. W. Garrett, Chairman,
Agricultural Center Board,
Uriah, Alabama.

Courts of County Commissioners—Counties—

Act No. 286, General Acts 1945, p. 473—

Act No. 344, General Acts 1945, p. 560—

The Governing body of a county, other than one in which there is to be located a regional coliseum for the purpose of housing fat livestock shows, agricultural and industrial displays and other exhibits consistent with the public good, may appropriate county funds for the purpose of aiding the county in which such facility is to be located in the constructing and equipping thereof, if such appropriation be deemed advisable by the governing body of the county making such appropriation.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

In our conversation of March 24, 1947, you requested that I render you my official opinion upon the following question:

"May the governing body of a county other than one in which there is to be located a regional coliseum for the purpose of housing fat livestock shows, agricultural and industrial displays and other exhibits consistent with the public good, appropriate and expend county funds for the purpose of aiding in the constructing and equipping of such facility within the designated county?"

It is my opinion that such an appropriation may lawfully be made.

In arriving at this conclusion, consideration is first given to the provisions of Act No. 286, General Acts 1945, page 473, effective October 1, 1945. This act, after making an appropriation of \$200,000 to the Agricultural Center Board, further provides as follows:

"Section 2. The appropriation herein made shall be used by the Agricultural Center Board, upon approval by the Governor, exclusively for the purpose of aiding in the constructing and equipping by counties and municipalities of facilities suitable for housing fat livestock shows, agricultural and industrial displays, and other exhibits consistent with the public good. Not more than \$50,000.00 of the appropriation may be expended by the Agricultural Center Board within the boundaries of any one county. The proportion of the total cost of such facilities borne by the Agricultural Center Board shall not exceed two-thirds in any instance. For purposes of this act, the cost of facilities shall not be deemed to include the cost of acquiring land, but shall include only the erection and equipping of buildings and other structures. Counties and municipalities may be allowed by the Agricultural Center Board, however, to include existing buildings and other structures and the equipment therein, if used or to be used for the purpose herein stated, in the cost of the facilities contemplated by this act; the credit given for such existing buildings, structures, and equipment, however, shall not in any instance exceed one-third of the cost of the facilities contemplated by this act."

It is apparent from an inspection of the above quoted section of Act 286, supra, that such appropriation is made for the purpose of "aiding in the constructing and equipping by counties and municipalities of facilities suitable for housing fat livestock shows, agricultural and industrial displays, and other exhibits consistent with the public good." This provision, in my opinion, carries with it a necessary implication that both counties and municipalities are authorized to expend county or municipal funds for the purpose of aiding in the constructing and equipping of such facilities.

Careful consideration of Act No. 286, supra, reveals no provision thereof requiring that the contribution made upon the part of counties or municipalities be made solely by the county or municipality within which such coliseum is to be located.

Next considered are the provisions of Act No. 344, General Acts 1945, page 560. (Title 12, Section 12, 1945 Cumulative Pocket Part, Code of Alabama 1940). This act, in prescribing the powers and authority to be exercised by county governing bodies, provides that they have authority:

"22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties * * * ."

It is my opinion that the above is express authority for a county governing body to make an appropriation of county funds for the purpose mentioned in your inquiry, if such appropriation is considered by the

county governing body to be for the best interest of the county and in furtherance of the development, advertisement, or promotion of the resources thereof.

Our state is primarily an agricultural one. The raising and marketing of cattle or livestock, and the promotion, advertisement, and development of such resources, are of paramount importance to the state as a whole. In my opinion, the benefits to be derived from the construction of what we commonly refer to as "cow coliseums" in certain designated counties of the state are not necessarily limited to the territorial boundaries of the counties in which such facilities are to be located. It is readily apparent that such benefits may extend to any number of counties surrounding the one in which a coliseum is located.

Inasmuch as the coliseums are to be constructed and equipped by the counties, with the aid and assistance of the state, as prescribed by Act No. 286, supra, and there being no express requirement that the contribution on the part of the counties be made solely by the counties in which such coliseums are to be located, it is my opinion that by virtue of the authority granted county governing bodies by the above quoted provision of Act No. 344, the governing body of a county other than one in which a coliseum is to be located may make an appropriation of county funds for the purpose of aiding in the constructing and equipping of such coliseum, if such appropriation be deemed advisable by said county governing body.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 3, 1947.

Hon. B. G. Baggett,
Sheriff,
Walker County,
Jasper, Alabama.

Sheriff—Walker County—Act No. 193, Local Acts 1945, page 105.

1. Act No. 193, Local Acts 1945, page 105, fixed a flat salary of \$5,000.00 annually for the sheriff of Walker County in lieu of the fees and commissions formerly paid him for the discharge of his official duties.

2. The county governing body of Walker is without authority of law, either under this local act or the general law, to furnish the sheriff or his deputies automobiles, gasoline and oil, to en-

able them to discharge their official duties, or to reimburse them for private automobiles so used, or to make any allowances to them whatsoever for expenses so incurred.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of January 30, 1947, is as follows:

"I respectfully request your official opinion upon the following subject, namely:

STATEMENT OF FACTS

"By Local Acts for Walker County, Alabama, Local Acts, 1945, page 105, the Sheriff of Walker County was placed upon a salary, and a Chief Deputy and two field deputies were allowed his office and their salary fixed and all the salaries made payable out of the general fund of Walker County, Alabama. The Act further provides that the Sheriff shall collect all fees and commissions allowed by law for services and pay the same to the Treasurer of the County for the use of the General Fund. No fees for the sheriff or his deputies are provided outside of the salaries fixed by the act. There is no provision in said Act for the County to furnish the Sheriff or his deputies any equipment, such as automobiles, gasoline, oil or upkeep of equipment to be used in the discharge of their duties. It is necessary in this County for the sheriff and his deputies to use automobiles, gas, and oil, to properly enforce the law and discharge their duties. The salaries fixed are inadequate to authorize them to personally furnish such equipment out of their salaries. It evidently was the intention of the legislature, since all fees must be collected and turned into the general fund of the County, that in turn the Board of Revenue, which has control of the general fund, would furnish to the sheriff and his deputies such equipment and supplies as would be reasonably necessary for the sheriff and his deputies to properly discharge their duties.

"Walker County is one of the large counties of the state with a population of about 75,000 persons. It would be an unreasonable construction of said Act to say that the sheriff and his deputies could properly discharge their duties and properly enforce the law if they were compelled to furnish their own equipment, supplies, gasoline, oil, and various other items and pay for the same out of their salaries which have been fixed by law. If they are compelled to do so then they would have nothing left on which to live.

QUESTIONS

"1. Under the foregoing facts and the Local Act referred to, does the Board of Revenue have authority to furnish the sheriff

and his deputies with necessary automobiles to be used within Walker County, Alabama, on official business in the discharge of the duties of the office of the sheriff?

"2. Does the Board of Revenue have the authority to furnish the sheriff and his deputies with gasoline and oil, and provide for upkeep of automobiles used on official business within Walker County, Alabama, while in the discharge of their official duties?"

"3. If the sheriff and his deputies furnish their own private automobiles in the discharge of their official duties, has the Board of Revenue the authority to reimburse them by paying a sum certain per mile, for the mileage travelled on official business, in Walker County, Alabama, which sum to be fixed by the Board of Revenue and to be in lieu of gasoline, oil, upkeep and depreciation?"

An answer to your inquiry requires a consideration of Act No. 193, Local Acts 1945, page 105. This act:

1. Placed the sheriff of Walker County on a salary basis instead of a fee basis.

2. Fixed the salary of the sheriff of Walker County at the sum of \$5,000.00 per year.

3. Provided for one chief deputy at a salary of \$3,000.00 per year.

4. Provided for one field deputy at a salary of \$2,400.00 per year.

5. Provided for one field deputy at a salary of \$2,100.00 per year.

6. Provided for two jailers at a salary of \$1,500.00 per year each.

7. Provided for one office clerk or bookkeeper at a salary of \$1,500.00 per year.

8. Provided that the sheriff shall collect all fees and commissions allowed by law for his services and pay the same over to the Treasurer of Walker County for the use of the general fund of said County.

The act is completely silent as to allowances to the sheriff or his deputies for expenses incurred in the discharge of their official duties.

There is nothing obscure or inscrutable about any of its language. On the contrary, it is entirely clear and free from all ambiguity. It is a settled principle of statutory construction in this State that when the language of a statute is clear, it shall be construed to mean what it says. *White v. City of Decatur*, 25 Ala. App. 274, 144 So. 872, certiorari denied, 225 Ala. 646, 144 So. 873.

In the case of *Dixie Coaches, Inc. v. Ramsden*, 238 Ala. 285, 190 So. 92, the court expresses the thought in this language:

"Courts can only learn what Legislature intended by what it has said, and have no right to stray into mazes of conjecture or search for an imaginary purpose, in construing statute."

When the sheriff was inducted into his office, under this local act he assumed all the duties and burdens of the office for a remuneration fixed by the act in the annual sum of \$5,000.00 and left behind him all fees and commissions theretofore allowed to him under the law. In legal effect, he agreed to take the fixed salary in lieu of all these emoluments, and he further agreed that as a part of his legal duties he would collect all the fees and commissions theretofore paid to him and pay the same over to the Treasurer of Walker County for the use of the general fund of the county. Under this local act, the county became the owner of all such fees and commissions.

It is manifest that the Legislature intended to give the sheriff a fixed sum of \$5,000.00 per year to perform all the duties of his office in lieu of all fees and commissions, the aggregate of which theretofore constituted his compensation for discharging all of these same duties. If this was not the intention of the Legislature, it appears reasonable that the act would have provided for allowances for expenses. Having failed to mention any such allowances, I am not authorized to add any. There is no language in the statute on which to bring into operation implied powers and authority. The sheriff's duties, as I have said, are the same whether performed on a salary or under the fee system. All that was changed by this act is that now the sheriff and his deputies, etc. get a salary from the county and the county gets the fees and commissions allowed by law. It must be presumed the Legislature knew this when it adopted the statute and intended to do what it did do. I do not question the authority of the Legislature to provide for the payment of the necessary expenses incurred by the sheriff and his deputies in discharging their duties, but this act did not do so. If the Legislature had intended to allow, in addition to the salaries fixed, expenses, automobiles, etc. this act was the place to do it, but it did not do so.

It is the established law of this State that all administrative bodies or agencies of the State or counties are creatures of the Legislature and have only such powers as their creator confers upon them. Every such board or agency charged with the duty of devoting public funds to ends prescribed by law must point to a "thus saith the law" for every disbursement made. Unless a given charge is expressly or impliedly authorized, it cannot be lawfully incurred. *Woodruff v. Beeland*, 220 Ala. 652, 127 So. 235.

If this local act lacks wisdom or supposed wisdom, or is unreasonable or unjust, the remedy and the relief rest with the Legislature, and not with the courts or this office. We must declare what the law is, not what we think it should be. *Horton v. Mobile School Commissioners*, 43 Ala. 598; *State ex rel. Weatherly et al. v. Birmingham Water Works Company*, 185 Ala. 388, 64 So. 23.

It is manifest that the local act under consideration intended that the sheriff and his deputies be paid the flat salaries fixed in the act and no more, and that all fees and commissions formerly paid the sheriff belong to the county. Inasmuch as it is completely silent as to any allowances for expenses incurred, and there is no provision of general law authorizing such allowances, I am constrained to hold that the county governing body of Walker County is without authority of law to furnish the sheriff or his deputies automobiles, gasoline and oil to enable them to discharge their official duties, or to reimburse them for private automobiles so used, or to make any allowance to them whatsoever for expenses so incurred.

Respectfully,

A. A. CARMICHAEL,
Attorney General.

April 4, 1947.

Honorable M. M. Moulthrop, Mayor,
City of Eufaula,
Barbour County,
Eufaula, Alabama.

Municipalities—Elections—Absentee Ballots.

Act No. 465, General Acts 1945, page 699.

Act No. 478, General Acts 1945, page 711

1. A special election held to determine the question of adoption by a city of a commission form of government, as prescribed by Title 37, Chapter 4, Article 1, Code of Alabama 1940, should be held and conducted in compliance with the provisions of Act No. 465, General Acts 1945, page 699.

2. If the city in which such election is held has been divided into wards, it is mandatory that a polling place be established in each ward for the holding of such special election.

3. It is not mandatory that absentee ballots be furnished for such a special election.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of March 18, 1947, is as follows:

"The Judge of Probate of Barbour County, Alabama, has certified to me as Mayor of the City of Eufaula, that a petition submitted to him by a number of qualified electors of this city that the proposi-

tion of organizing this city under a Commission form of government, contains the requisite number of electors signed by them, and that I call a special election to determine whether this city shall be so organized under the provisions of Chapter 4, Article 1, Sections 35-40, et seq., Title 37, Code of Alabama, 1940.

"Section 37 of Title 37, Code 1940, provides that within forty (40) days after receipt of said certificate from said Probate Judge, that I shall call a special election and submit the question whether this city shall adopt the Commission form of government.

"By authority of Section 240, Title 55, Code of 1940, as amended by Act of 1943, Page 238, Regular Session 1943, I respectfully request an opinion of you to guide me in submitting this question to the qualified electors of the City of Eufaula.

"(1) Shall the special election to determine the question be held under the rules and regulations as provided for holding municipal elections under general election laws, Section 26, Title 37, Code of 1940?

"(2) It being a special election to determine the question, is it mandatory that a polling place be opened in each ward of the City?

"(3) Is it mandatory that absentee ballots be provided for such election? If so, shall casting absentee ballots be governed by the same provisions of Article 4, Section 57, Title 17, Code of 1940?"

Your inquiry presents three questions for consideration and answer. They shall be dealt with herein in the numerical order in which they are set out in your letter.

In answer to your first inquiry, it is my opinion that a special municipal election held to determine the question of the adoption by the city of a commission form of government, as provided by Title 37, Chapter 4, Article 1, Code of Alabama 1940, should be held and conducted under the provisions for the holding of municipal elections set out in Act No. 465, General Acts 1945, page 699.

Title 37, Section 40, Code of Alabama 1940, dealing with special municipal elections held to determine the question of adoption by the city of a commission form of government, provides as follows:

"The election thereupon shall be conducted, the vote canvassed and the result declared in the same manner as provided by law in respect to other city elections * * * ."

It should be pointed out that the statutory provisions for the holding of municipal elections under the general election laws (Title 37, Sections 26-33, Code of Alabama 1940) were repealed by Act No. 464, General

Acts 1945, page 698. The provisions controlling such elections are now to be found in Act No. 465, supra.

Section 1 of Act No. 465, supra, provides as follows:

"Elections in cities and towns of this state shall be conducted according to the general election laws except as otherwise provided in this title. This title, however, shall not apply to cities and towns organized under a commission form of government."

Inasmuch as the City of Eufaula is just now voting upon the adoption of a commission form of government, the above exception would not be applicable.

It is, therefore, my opinion that the provisions contained in Act No. 465, supra, should be followed in holding the special election mentioned in your inquiry.

Your second inquiry raises the question of whether it is mandatory that a polling place be provided in each ward of the municipality for the casting of ballots in the election under consideration.

It is my opinion that a polling place should be provided in each ward of the municipality for the holding of the election.

Reference is again made to Act No. 465, supra, the provisions of which are held to be applicable to the conducting of the election in question. Section 6 of this act provides as follows:

"Section 6. The voting places shall be fixed by the council, one or more voting places for each ward, where such city or town has been divided into wards, and the elector must vote in the ward of his residence and nowhere else, and if any elector attempts to vote in any ward other than that of his residence, his vote must be rejected. It is provided, however, that any elector who, within three months next preceding the date of the election at which he or she offers to vote, has removed from the ward to another ward in the same city or town, shall have the right to vote in the ward from which such elector has so removed, if he or she would have been entitled to vote at such ward but for such removal."

In view of this provision, it is my opinion that, if your city has been divided into wards, it is mandatory that a polling place be established in each ward for the holding of this election.

You next inquire as to whether it is mandatory that absentee ballots be provided for the election under consideration, and, if so, what provisions of law shall govern the casting of such ballots.

It is my opinion that it is not mandatory that absentee ballots be

provided for a special election in which the residents of a city are voting upon the question of adopting a commission form of government.

The present law with reference to absentee voting is found in Act No. 478, General Acts 1945, page 711. The provisions of law referred to by you in your third inquiry (Title 17, Sections 57-64, Code of Alabama 1940) were repealed by Act No. 478, supra.

It is significant to note that the statutes governing absentee voting, as they existed prior to the enactment of Act No. 478, supra, (Title 17, Sections 57-64 and Sections 417-424, Code of Alabama 1940) specifically provided that such statutes were applicable to any general, special, municipal or primary election, whereas, Act No. 478, supra, provides that it shall be applicable only to primary, general and municipal elections. It is my opinion that omission from Act No. 478, supra, of the word "special" indicates an intent on the part of the legislature to exclude from the purview of such act special elections of the nature here under consideration.

Reference to Title 37, Sections 37-38, Code of Alabama 1940, shows that an election to be called for voting upon adoption by the city of a commission form of government is specifically defined as a "special" election. Hence, it is my opinion, that such an election does not fall within the purview of Act No. 478, supra, and it is not mandatory that absentee ballots be provided.

Be that as it may, an inspection of Act No. 478, supra, discloses that the provisions of said act could not apply to the election here considered. Section 3 of this act provides, in part, as follows:

"Not less than sixty days from the time of the holding of any primary, general, or municipal election authorized by law, the officer charged with the printing and distribution of the official ballots shall cause to be delivered to the probate judge of each county in which said election is held a sufficient number of absentee ballots and other printed matter required by law. * * * ."

Title 37, Section 37, Code of Alabama 1940, provides as follows:

"The mayor of such city shall immediately upon receipt of such petition from the probate judge, by proclamation, submit the question of organizing the city under this article at a special election to be held at a time specified therein, within forty days after the receipt of said certificate from said probate judge."

Inasmuch as this statute imposes a mandatory duty upon the mayor to call such election within forty days after the receipt by him of the petition from the probate judge, it is readily apparent that the present

law with reference to absentee voting could not be made applicable to such an election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1947.

Hon. Edgar Underwood, Probate Judge
and Chairman,
Court of County Revenue
Franklin County,
Russellville, Alabama.

Counties—Courthouses—Fine and Forfeiture Fund—Title 12,
Section 178, Code of Alabama 1940—Title 12, Section 34, Code
of Alabama 1940.

1. Under Title 12, Section 178, Code of Alabama 1940, a county governing body may enter into a contract for general repairs to the courthouse, including an architect's fee, without the necessity of competitive bids. The expense thereof is payable out of the general fund of the county.

2. A transfer of a surplus in the fine and forfeiture fund of a county to the general fund may be made to defray such expenses of repairing the courthouse, if such transfer is made in accordance with Title 12, Section 34, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of March 10, 1947, is as follows:

"Franklin County has a surplus of approximately \$15,000.00 in the Fine and Forfeiture Fund of the county and the Court of County Revenue desires to use this surplus to repair, paint, add new doors and generally overhaul the courthouse. This improvement will entail the fee of an architect and we desire to have the work done under a contract. Please advise me whether or not said surplus of said fund can be transferred to the General Fund of the County and said improvement paid from the General Fund of the county including the architect's fee. Also whether or not the Court would be required to have competitive bids on the contract for said work.

Competitive bids are difficult to get at this time and it may be that the Court of County Revenue would have to take the architect's opinion on the reasonableness of a single bid. Can that be done?"

In reply to that portion of your inquiry relative to the general repair of the courthouse, your attention is invited to Title 12, Section 178, Code of Alabama 1940, which provides as follows:

"§178. County buildings erected and repaired by county.—The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the court of county commissioners, which court is authorized to make all necessary contracts for that purpose."

In the discharge of the duties set out in the above Section, the county commissioners are vested with a discretion which cannot be controlled by any judicial tribunal, that is, in the absence of fraud or unfair dealing.—*Weeks v. Bynum*, 158 Ala. 231, 48 So. 489.

Under Section 178, *supra*, the court of county commissioners has control of all of the property of the county. "A duty resting upon them is the erection and keeping in repair the courthouse and jail; and for these purposes they may make all necessary contracts."—*Biennial Report of Attorney General, 1926-1928*, page 716. All such work done should be by contract, duly authorized by the court, as shown by its minutes. The contract should be in writing, and the bond of the contractor should be given in compliance with Title 50, Section 16, Code of Alabama 1940.—*Biennial Report of Attorney General, 1930-1932*, page 423. There is no requirement that there be competitive bids in the award of a contract for such work.

In my judgment, an architect's fee is a necessary incidental expense of the cost of the work to be done.—*Cf. Biennial Report of Attorney General, 1936-1938*, page 227.

Title 12, Section 178, *supra*, places the burden of defraying the repairing expenses incurred thereunder upon the general fund of the county.—*Biennial Report of Attorney General, 1934-1936*, page 303.

In view of the above, it follows that the county governing body may enter into a contract for the general repair of its courthouse, including the fee of an architect, without necessity of competitive bids. The expense thereof is payable out of the general fund of the county.

If there be a surplus in the fine and forfeiture fund of the county, such surplus may, subject to certain limitations, be transferred to the general fund of the county under the provisions of Title 12, Section 34, Code of 1940, which is as follows:

"§34. Transfer of fine and forfeiture fund to general fund.—

The county treasurer of any county in this state may transfer any balance on hand at the end of the fiscal year of the fine and forfeiture fund, in excess of the registered claims and lawful claims or charges against said fund to the general fund or to any special fund to which by resolution of the board of revenue, or court of county commissioners, expressed in writing and spread upon the minutes of the court, he may be directed."

The transfer is strictly limited to the express authority therein granted. It cannot be made at the end of the fiscal year in the absence of the required list of registered claims and charges.—Quarterly Report of Attorney General, Volume 33, page 111.

If the transfer of the surplus in the fine and forfeiture fund of Franklin County is properly made to the general fund of the county, the same may be used to cover the expenses of the general repairs to the courthouse in accordance with the first portion of this opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1947.

Hon. Y. K. Lewis, President,
Board of Revenue,
Marengo County,
Linden, Alabama.

Counties—Courts of County Commissioners—Act No. 344,
General Acts 1945, page 560.

1. County governing body may lawfully appropriate county funds for the purpose of providing office space and janitor service for the County Agricultural Conservation Association.

2. Such appropriation, if made, should be from the general fund of the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 20, 1947, is as follows:

"Please give us your opinion as to whether or not it is permissible

for Marengo County to rent an office and employ a janitor for the Marengo County Agricultural Conservation Association.

"If so, from what funds is it permissible?"

It is my opinion that the Board of Revenue of Marengo County may appropriate county funds for the purpose of providing an office and janitor service for the Marengo County Agricultural Conservation Association. It is my further opinion that such appropriation should be made from the general fund of the county.

In response to my request for additional information with reference to the Marengo County Agricultural Conservation Association you have furnished me with excerpts from the Articles of such Association. These articles provide in part as follows:

"ARTICLE II.—PURPOSE. Section 1. Purpose.—The purpose of the Association shall be to cooperate with the Secretary of Agriculture of the United States, hereinafter referred to as the 'Secretary of Agriculture,' the Agricultural Adjustment Agency, and other agencies of the Department of Agriculture, in carrying out, in accordance with the applicable laws, regulations, rules, and official instructions, the provisions of Sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, the Agricultural Adjustment Act of 1938, the Federal Crop Insurance Act, the Sugar Act of 1937, and any amendments to such acts, and such other Acts of Congress as the Secretary of Agriculture may designate. The Association shall not engage in any other activity."

It appears that this Association is organized under the provisions of the Soil Conservation and Domestic Allotment Act of 1935, 49 Stat. 163 (Title 16, Section 590h (b) U.S.C.A., as amended) and that one of the primary purposes of said Act, and of the other Acts referred to in Article II of the Articles of the Association, is the promotion of soil conserving and soil rebuilding practices, and the development and preservation of soil fertility.

Act No. 344, General Acts 1945, page 560, approved July 6, 1945 (Title 12, Section 12, 1945 Cumulative Pocket Part, Code of Alabama 1940) dealing with the authority of county governing bodies authorizes them:

"22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories, and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corpora-

tion or association to carry out the purposes set forth in this subdivision."

It will be noted that the above section authorizes the appropriation and expenditure of county funds by the governing body of a county for the purpose of "developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind" of the county.

It is my opinion that, in view of the declared purpose of the Marengo County Agricultural Conservation Association, the above section is express authority for the Board of Revenue of Marengo County to make an appropriation from the general fund of said county for the purpose of providing office space and janitor service for such Association, if such appropriation is deemed advisable by the county governing body. Quarterly Report of Attorney General, Vol. 17, page 247.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 10, 1947.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
Montgomery, Alabama.

Health and Health Department—Statutes—Act No. 211, General Acts 1945, page 330—Act No. 210, General Acts 1945, page 328—Public Law 725—79th Congress.

1. Act No. 211, General Acts 1945, page 330, creates the State Board of Health as a sole or single agency to administrate the acquiring, constructing, equipping, maintaining and operating of hospitals, and authorizes such agency to cooperate and make contracts for the state with the United States, or any local political subdivision of the state, or any non-profit association or public improvement society in acquiring, building, equipping, maintaining, and operating hospitals to serve the general public.

2. The advisory council provided for in Act 211, supra, has only authority to advise and approve the master hospital plan required by the Act and when this authority is exercised, the authority and duties of the advisory council are exhausted and ended, and it has no authority to approve or disapprove anything else connected with the administrator in the execution of the plan or plans.

3. Act No. 211, *supra*, authorizes the State Board of Health to act or take action to meet the requirements of Public Law 725, 79th Congress, giving state aid to the support of state hospitals known as the Hospital Survey and Construction Act.

4. Act No. 211, *supra*, meets all the requirements of Public Law 725 requiring the fixing of a minimum standard for the maintenance and operation of hospitals by giving the administrator authority to pass and adopt all necessary rules and regulations.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

This will acknowledge your communication enclosing a letter from Hon. Lloyd H. Chadbourn, Hospital Administrator of the U. S. Public Health Service, under date of February 26, 1947, addressed to you, in which certain criticisms and objections are made against Act No. 211, General Acts 1945, page 330, which Act, among other things, authorizes the State Board of Health to construct, equip, maintain, and operate public hospitals and health centers. Said Act also designates the State Board of Health as the sole and official agency of the State to receive and administer all funds appropriated by the United States for such purposes.

The federal act under consideration is Public Law 725—79th Congress, approved August 13, 1946, and cited as the "Hospital Survey and Construction Act." This Act amended the Public Health Service Act of July 1, 1944, 58 Stat. 682.

The criticisms and objections are based upon Public Law 725, *supra*, and may be summarized as follows:

1. Does Act No. 211, *supra*, provide for a single state agency to execute the plan for constructing a system of hospitals by the state?

2. What are the powers of the advisory council named in Sections 1 and 2 of Act No. 211, *supra*?

3. Does said Act authorize voluntary and non-profit institutions as well as public hospitals to share in the federal funds?

4. It is claimed that Act No. 211, *supra*, contains no general provisions authorizing the state agency to take action to meet the requirements of Public Law 725, nor to specifically authorize the agency to take the particular type of action set forth in Section 623 (a) of Public Law No. 725, *supra*, and the Surgeon General's regulations under Section 622 of Public Law 725.

5. It takes the point that under Section 6 of Act No. 211, supra, the Board of Health is authorized to establish rules and regulations providing standards for construction and operation of hospitals and for licensing the same.

6. That Act No. 211, supra, contains no provisions for the enforcement of the standards of construction.

Before reviewing the specific points presented by the above questions, it is necessary to make some observations on the general principles involved, as well as certain constitutional provisions in the Constitution of Alabama.

For several years prior to and at the time of the enactment of Act No. 211, supra, public opinion in the states and the nation on questions concerning public welfare of the people was demanding legislation on the subject. This public opinion had spurred into action the Congress of the United States and of several of the states, resulting in the passage of laws in aid of public education, public highways, hospitals, research boards, etc. The federal government had passed laws giving financial aid to the states in carrying out these demands at the time of the passage of the Alabama statute. There was an alarming need for hospitals to accommodate the sick and diseased, but Alabama was hedged about by reason of insufficient public funds, as well as constitutional provisions, preventing the state from engaging in building hospitals in its broadest sense.

The Constitution of Alabama 1901, Section 93, prohibited the state from engaging in works of internal improvements or from being interested in any private enterprise or to lend money or its credit to any individual or corporation.

These provisions have been liberalized by amendments numbered 1, 9, 12 and 21 to the Constitution of Alabama 1901. However, none of these amendments made mention of public or private hospitals. To meet this situation, the legislature submitted to the people for adoption an amendment to the Constitution authorizing the state to acquire, build, establish, own or operate and maintain, hospitals, health centers and other health facilities, and to appropriate funds therefor. It authorized counties and municipalities to appropriate funds in aid of such purposes and gave authority to the legislature to designate or create an agency to administer the construction, maintenance and operation of hospitals. It also authorized the legislature to pass laws to accept and administer funds appropriated or donated for such purposes by the United States Government, upon such terms and conditions as may be imposed by the United States Government.

The Act proposing such amendment was passed by the Senate June 5, 1945, and by the House of Representatives on June 22 of the same year. (Act No. 210, General Acts 1945, page 328.) Obviously, in anticipation

of the adoption of this proposed amendment, the legislature passed Act No. 211, General Acts 1945, page 330. This Act undertook to exercise the authority granted by the proposed amendment.

The constitutional amendment proposed by Act No. 210, *supra*, was submitted to the voters at the general election held November 5, 1946, and was proclaimed ratified by Proclamation of the Governor on November 14, 1946.

Keeping in mind the foregoing, I will review the criticisms leveled at Act No. 211, *supra*. This Act in unambiguous language, names the State Board of Health as the state's sole administrator thereof. Section 5 expressly designates the State Board of Health "as the sole and official agency of the State." Section 2 authorizes the State Board of Health to acquire, construct, equip, maintain and operate public hospitals and health centers for treatment of diseases, and it also authorizes said Board to cooperate and make contracts with the United States. Section 3 requires the State Board of Health to set up a "master hospital plan" (emphasis added) and divides the state into regions and fixes their boundaries. The language used leaves no doubt that the State Board of Health is the single state agency to administer the provisions of this law. This first criticism of the Act grows out of the second point posed by the government. It is there conceived that the provisions in Sections 1 and 4 of the Act providing for an advisory council to approve the plans or policies to be pursued by the State Board, indicates that the State Board is not the sole or single state agency.

This suggestion is based on provisions in Section 623 (1) of Public Law 725. It is therein required that the state plan must designate a single state agency as the sole agent for the administration of the plan. The federal government is of the opinion that if the advisory council has authority to veto the action of the State Board of Health, then there would be more than one state agency and, therefore, the state would be denied the benefit of Public Law 725; but that if the advisory council is vested only with advisory power, it concedes the criticism is not well founded.

As I construe Act No. 211, *supra*, in connection with Public Law 725, *supra*, it is wholly unnecessary to pass upon this question.

An examination of Act No. 211, *supra*, makes it self evident that the duties of the advisory council have been performed completely before the State Board of Health ever makes application to the government for financial aid under Section 625 of Public Law 725. Section 1 of Act No. 211 defines, at least in part, what is meant by a "master hospital plan" as used in said Act. It says that it refers to a plan determined upon by the State Board of Health and approved by the advisory council. Section 3 of Act No. 211 authorizes and requires the State Board of Health to set up a master hospital plan, and Section 4 creates an advisory council and clothes it with authority to approve the policies for carrying out the

purposes of the Act. I have been unable to find a legal definition of "master hospital plan." We speak of a master taxing plan; a master educational plan. The word master qualifies the word plan; the word plan has a number of meanings, but as used here it means a method or scheme; a general work or proposed method of action or procedure; or a settled course or method. This master hospital plan under the above definitions means the making of a framework setting up an entire system of hospitals to be constructed in the state or subdivisions thereof. It lays down general fundamental requirements to be pursued and leaves the details of carrying out the plan to the party designated as administrator. Section 4 of Act No. 211 substitutes for the word plan, the word policy. The word policy is used in the same sense as plan in Section 1 of the Act. It is defined by our lexicographers as meaning a wise scheme; a settled course or method; or still better, prudence or wisdom in the management of public affairs. Act No. 211 under review clearly shows a purpose for a considered plan and undertakes to furnish the administrator with additional help in making the plans. When this is done, all the duties and authority of the advisory council is at an end, so far as making a plan or plans is concerned. It has nothing further to do with the execution of the plan or the application to the federal government for allocation of funds for the costs of the construction and operation of the hospital system or systems. All this must be done before the federal government is approached on the subject.

Public Law 725 here under consideration very clearly supports my conviction. Section 625 of this law in the opening sentence says: "For each project for construction pursuant to a state plan approved under this part there shall be submitted to the Surgeon General through the state agency an application by the state or political subdivision thereof." (Emphasis added. It voices what the application shall show, among which are plans and specifications for the project. Section 623 of said law provides that to take advantage of the law the state may submit a state plan for carrying out the purposes of Section 601 (b) thereof. It is obvious that the word plan is used in the same sense in the federal law and state act.

The third criticism of Act No. 211, supra, is directed to what the government terms publicly owned hospitals, but does not include voluntary and non-profit institutions. Section 2 of Act No. 211 expressly authorizes the State Board of Health to make contracts with the United States Government and local or political subdivisions of the state, or with any non-profit association or public improvement society, in acquiring the building and maintenance of public hospitals. I find nothing in Act No. 211 about publicly owned hospitals. Said Act does use the words public hospital. The word public as here used is in the sense that the hospital shall be for the accommodation of the general public. Moreover, as I have noted, Section 2 includes non-profit associations or improvement societies. The words association and societies are, under our law, to be considered as unincorporated bodies having the legal status of private individuals.

The government's fourth criticism suggests that Act No. 211 contains no general provision authorizing the state agency to take such actions as are necessary to meet the requirements of the federal law. I do not quite comprehend this criticism. One of the central purposes of Act No. 211 is to create a law to acquire hospitals for the general public. It creates a state agency with full power to carry out the aims and purposes of the statute and expressly authorizes the agency to cooperate with the federal government in the execution of the plan. It is true the statute does not direct the agency just what words to use or in what manner to approach the government for its part of the funds used or to be used. Such matters go with the powers conferred on the State Board of Health. The State Board of Health is given very sweeping powers and such matters as are here suggested fall within the scope of its authority. Moreover, Public Law 725 prescribes how and what shall be done to receive the federal funds, and that question will arise only and when the state makes application for the funds.

The fifth criticism takes the point that Section 6 of Act No. 211 authorizes the State Board of Health to make rules and regulations fixing the standard of construction and provide for a license, and that it is not clear whether or not this section meets the requirements of Section 623 (a) (7) and Section 623 (d) of Public Law 725. Section 6 of Act No. 211 vests unlimited power in the state agency to make rules and regulations providing standards for the construction and operation of hospitals. It is for the State Board of Health to make the rules fixing the standards. The statute met the requirements of the federal act when it authorized the Board to make the rules. This requirement must appear not in Act No. 211, but in the state plan prepared by the Board and whether or not this has been done will not arise until application for federal funds is filed or made.

Public Law 725 does not require that such provision shall appear in the state statute but only in the "state plan."

The last criticism of the government is that it is a question as to whether existing legislation in Alabama is adequate to furnish a legal basis for an approvable state plan. That objection is so general that it is hard to know just what is the supposed defect in the statute. From the government's entire letter it appears that this last criticism has been met in that part of my opinion discussing the other criticisms.

Viewing the state statutes here reviewed, I draw the following conclusions:

First, Act No. 211 creates the State Board of Health as the sole or single state agency to administer the acquiring, constructing, equipping, maintaining and operating of public hospitals, and authorizes it to cooperate and make contracts for the state with the United States or any local political subdivision of the state, or non-profit association or public

improvement society, in acquiring and operating such hospitals for the general public.

Second, the advisory council provided for in Act No. 211 has only authority to advise and approve the master hospital plan required by the state act as well as the federal law, and when this is executed, its authority and duties are exhausted and ended, and it has no power to approve or disapprove anything else connected with the administrator in the execution of the plan or plans.

Third, Act No. 211 authorizes the State Board of Health to act or take action to meet the requirements of Public Law 725.

Fourth, Act No. 211 meets the requirements of Public Law 725 in requiring the fixing of a minimum standard for the maintenance and operation of hospitals.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 11, 1947.

Hon. Marshall J. Williams,
Sheriff, Barbour County,
Clayton, Alabama.

Costs and Fees—Sheriffs—Arrest Fee—Guard Fee—Title 11, Section 100; Title 13, Section 328; Title 45, Section 117; Title 13, Section 330; Title 45, Section 119, Code of Alabama 1940.

1. Sheriff is not required to produce a mittimus in each case wherein he claims arrest fees and guard fees.

2. Arrest fees may be claimed by sheriff regardless of whether mittimus issues or not.

3. Guard fees of sheriff are not barred for reason that sheriff does not obtain a mittimus in each case.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 13, 1947, is as follows:

"Mr. Fox, an examiner of accounts recently informed me that in order to collect certain fees connected with making arrests in criminal cases that it is necessary that I have mittimus or commitment in each instance.

"Heretofore it has never been our practice to obtain mittimus except from Justices of Peace. In other words we execute warrants issued by the Judge of the County Court and capias on grand jury indictments, the warrant or indictment being our authority to make the arrest and our return on the same disclosing just how we executed the same.

"I might add that we have never had any trouble collecting our fees under this practice, and I might further add that to secure mittimus in each case would incur a great deal of trouble.

"Thank you to kindly advise me if it is necessary to get mittimus on each County Court warrant and on each capias issued on grand jury indictment."

In your inquiry you refer to "certain fees connected with making arrests in criminal cases." No doubt you refer to the sheriff's fee "for executing a writ of arrest in misdemeanor cases," and the fee "for executing all writs of arrest in felony cases"; also the guard fee "for guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not	2 00
"In all arrests under indictment whether convicted or not ...	2 00
"In all other cases where conviction follows arrests	2 00"

(Title 11, Section 100, Code of Alabama 1940.)

You are advised that in order to claim the fee for executing a warrant or writ of arrest in a misdemeanor or in a felony case, it is not material whether you have a mittimus or not. This fee is paid for the service of executing the warrant or writ of arrest, which service is completed as soon as the prisoner is taken into custody. The fee for this service, therefore, does not depend on whether or not a mittimus issues.

As for the guard fee, you are entitled to this fee when each prisoner is "lawfully committed to jail," in the cases enumerated in Title 11, Section 100, Code of Alabama 1940. The question is whether or not a mittimus is necessary in each case before it can be said that the prisoner is "lawfully committed to jail," within the meaning of Section 100, supra.

It is my opinion that it is not necessary for you to procure a mittimus in order to claim the guard fee when you execute a writ of arrest or capias issued on a grand jury indictment. Such writ of arrest or capias includes a mittimus (Title 15, Sections 170, 171, Code of Alabama 1940), in that the writ orders you to commit the defendant to jail unless he gives bail. When you execute the order in this writ of arrest, it is my opinion that the prisoner has been lawfully committed to jail, and the lack of a separate mittimus would not prohibit your claiming the guard fees. See Biennial Report of Attorney General, 1936-38, p. 238.

When a warrant of arrest issues from the county court, it is my opinion that the prisoner may be "lawfully committed to jail," in some instances, without the issuance of a mittimus. Hence it is not the rule that in order to claim guard fees you must obtain a mittimus in each commitment of persons arrested by warrants issued from the county court. Although the warrant of arrest ordinarily issuing from the county court does not include a mittimus, as does the writ of arrest issuing from the circuit court, it is my opinion that under the warrant of arrest alone you may lawfully commit the prisoner until the time for his trial. Title 13, Section 328, Code of Alabama 1940.

The warrant of arrest issuing from the county court commands the arresting officer to arrest the prisoner and bring him before the county judge on a certain day. Title 13, Section 328, Code of Alabama 1940. If, after the person is arrested, he fails to make bond for his appearance at the day set for trial, and fails to obtain an immediate trial, it is my opinion that the sheriff may hold said prisoner in jail for a reasonable length of time and until his trial without a mittimus and on authority of the warrant of arrest. *Hayes v. Mitchell*, 69 Ala. 452. Cf. Quarterly Report of Attorney General, Vol. 20, p. 248. Title 45, Section 117, Code of Alabama 1940. The statutes, however, require a speedy administration of justice in the county courts, and the prisoner should be brought before the county judge at the earliest time that such magistrate is accessible. Title 13, Section 330, Code of Alabama 1940.

Some of the opinions of this office may be construed to require a mittimus in each case before a sheriff could claim his guard fee. Quarterly Report of Attorney General, Vol. 4, p. 90. This opinion, however, is based upon the rule that in order to claim two guard fees for one act of committing to jail it is necessary that each claim be evidenced by a separate mittimus.

Although statutes require that the sheriff file the process or order by which any prisoner is committed to jail, it has been held by this office that the failure of the sheriff to have on file such order did not bar his claim to fees. Title 45, Section 119, Code of Alabama 1940; Biennial Report of Attorney General, 1936-38, p. 239.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 11, 1947.

Honorable J. S. Freeman,
Chairman,
Walker County Board of Revenue,
Jasper, Alabama.

Fine and Forfeiture Fund—Intoxicating Liquors—Costs and
Fees—Title 29, Section 152, Code of Alabama 1940.

In a liquor nuisance case when the State is unsuccessful and court costs are adjudged against the State by order of the court, such costs are payable from the fine and forfeiture fund or its equivalent under the provisions of Title 29, Section 152, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 10, 1947, is as follows:

“A bill in equity was filed in Walker County by the State against Luther Lambert and Maybelle Lambert to abate an alleged liquor nuisance. The case was appealed to the Supreme Court from a decree against the defendants and that court reversed the decree and rendered judgment dismissing the bill. The case is reported in 28 So. 2d. 412. The judgment of the Supreme Court with reference to the cost is as follows:

“‘It is further, ordered, adjudged and decreed that the cost of the appeal of this court and of the circuit court be taxed against the appellee, the State of Alabama.’

“Section 152 of Title 29 provides that the cost in such cases, unless charged by the court to and collected from the defendant, ‘shall be paid as in criminal cases in which the state fails, upon the court making an order to that effect.’

“Section 392 of Title 15 with reference to costs in criminal cases where the state fails says ‘judgment therefor must be entered in favor of the State for the use of the particular county.’

“The register has filed with the Board of Revenue (Walker County officers are on salary) statement of the cost in the case, including the cost of appeal, as a claim against the county. There have been some opinions from your office but none of them seem to touch the exact situation here. You will note that before a claim can be charged against the fine and forfeiture fund judgment must be entered in favor of the state for the use of the county. (Title

15, Section 392). Also in liquor nuisance cases the cost, where not collected from a defendant, shall be paid as in criminal cases in which the state fails only 'upon the court making an order to that effect.' No such order was made in the Circuit Court or in the Supreme Court and the cost of appeal was adjudged against the state, but not 'for the use of the particular county.'

"The Legislature in 1945 passed an act abolishing the fine and forfeiture fund of Walker County, thereby making all claims which would otherwise be charged against that fund liabilities against the general funds of Walker County.

"Local Acts 1945, page 190.

"I would appreciate an opinion from you as to whether the cost in the Lambert case above referred to is a proper claim against Walker County and payable out of the general funds of the county since there is no longer any fine and forfeiture fund in this county."

Title 15, Section 392, Code of Alabama 1940, referred to in your request, has no connection with the question presented. This section merely prescribes how certain judgments must be drawn when a defendant has been ordered to pay a fine to the state.

The court costs referred to in your inquiry are payable from the fine and forfeiture fund of the county or its equivalent—the general fund. Quarterly Report of Attorney General, Vol. 26, pp. 109, 112.

Title 29, Section 152, Code of Alabama 1940, controlling the payment of costs in suits to abate a liquor nuisance, is as follows:

"Sec. 152 Fees and allowances to officers making seizures, when and how paid.—There shall be allowed the officer making the seizure under such writ in an injunction case the sum of three dollars and the sum of ten cents for every mile traveled in making the seizure, together with such reasonable sum as the court may deem just for necessary expenses incurred in transporting and providing storage for liquors and beverages and other movable property seized; all which costs shall be taxed in the bill of costs, and if not collected from a defendant, then shall be taxed and paid as in criminal prosecutions in which the state fails; and the costs in such injunction case, unless charged against some party defendant by the court and collected from him, shall be paid as in criminal cases in which the state fails, upon the court making an order to that effect."

It has been held by this office that in liquor nuisance cases when the State was unsuccessful and the costs were taxed against the State of Alabama, such costs were payable out of the fine and forfeiture fund of the county or its equivalent. Quarterly Report of Attorney General, Vol. 26, pp. 109, 112, *supra*.

In my opinion, the facts in your inquiry are similar. The State, although successful on trial, is now the unsuccessful party, the judgment of the trial court having been reversed and rendered. Further, the costs have been taxed against the State of Alabama. A judgment of a court, including the Supreme Court, taxing costs against the State is a sufficient compliance with the provision in Title 29, Section 152, *supra*, to the effect that the court must make an order before such costs are payable from the fine and forfeiture fund or its equivalent. Quarterly Report of Attorney General, Vol. 14, page 314.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 11, 1947.

Hon. Ralph P. Eagerton,
Chief Examiner of Accounts,
Finance Department,
CAPITOL.

Taxation—Motor Vehicles—Municipalities—Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, p. 504, approved July 7, 1945.

Under the provisions of Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, p. 504, approved July 7, 1945, tax assessors and tax collectors are required to assess and collect ad valorem taxes on motor vehicles due all incorporated municipalities of over 100 inhabitants, only after proper notice by the municipalities involved of the existence of a valid levy by such municipalities. The municipal authorities, and not the tax assessors and tax collectors, are responsible for the failure of collecting such tax in the event said notice is not given. •

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of March 10, 1947, is as follows:

“Under Section 704(d) of Title 51, Code of 1940, as amended by Acts 1945, page 504, tax assessors and tax collectors in several counties of this State, in addition to assessing and collecting the ad valorem taxes due the cities and counties on motor vehicles, shall

collect the ad valorem taxes due on motor vehicles in all cities in this State.'

"There are several instances wherein cities which do not avail themselves of optional method of collecting ad valorem taxes under the provisions of Sections 698-732 of Title 37, Code of 1940, have actually made a valid levy of ad valorem taxes in general, which includes motor vehicles. These cities have not notified the tax assessors or tax collectors of the levy so made.

"In view of the above, I would like to be advised as to whether or not it is incumbent upon the tax collectors or tax assessors to ascertain if there has been a levy of ad valorem taxes on motor vehicles in all cities in their counties, or is it incumbent upon the city so levying the taxes upon motor vehicles to notify the assessor and collector?

"In the event of the failure to collect said taxes, upon whom does the responsibility fall?"

In answer to your first inquiry, it is my opinion that it is not incumbent upon the tax assessors or tax collectors to ascertain if there has been a levy of ad valorem taxes on motor vehicles in all cities in their respective counties, but it is the duty of the municipal authorities so levying the taxes to notify the assessors and collectors of such levies.

A municipality desiring to use county machinery for assessing, equalizing and collecting its taxes under the provisions of Title 37, Sections 698-732, Code of Alabama 1940, must pass a proper ordinance and deliver a certified copy of same to the tax assessor on or before June 1, in order to place the duty of assessing, equalizing and collecting taxes for the following year on the county officials.—Quarterly Report of Attorney General, Vol. 17, page 267.

Although a municipality may not elect to avail itself of the optional method of collecting its ad valorem taxes, under the provisions of Title 37, Sections 698-732, *supra*, nevertheless, under the provisions of Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504, approved July 7, 1945, provision is made for the collection of ad valorem taxes on motor vehicles due all cities in this State where there has been a valid levy by the municipality involved.—Quarterly Report of Attorney General, Vol. 14, page 17.

Subsection (d) of Section 704, as amended, *supra*, provides in pertinent part as follows:

"(d) The tax assessors and tax collectors of the several counties in this state, in addition to assessing and collecting the ad valorem taxes due the state and counties on motor vehicles, shall collect the ad valorem taxes on motor vehicles due all cities in

this state. The tax collector shall report and pay over the money collected for said cities at the same time and in the same manner as state and county taxes are reported and paid over by him. Said assessors and collectors shall each receive a commission of two and one-half percent of the amount of city taxes collected; and the tax collectors shall deduct said commission from the amount collected before paying the city treasury, and at the time pay over to the tax assessor commissions due him under this article. The judge of probate shall not issue a license to operate a motor vehicle on the highways of this state until all ad valorem taxes due the said state, counties and cities are paid for the preceding year as shown by a receipt of the tax collector. * * * * *

In construing schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, which is the same as Subsection (d) of Section 704, as amended, above quoted, this office held that it was incumbent upon the tax assessors and tax collectors to assess and collect ad valorem taxes on motor vehicles due all incorporated municipalities of more than one hundred inhabitants, provided that said municipal corporations have levied such a tax.—Quarterly Report of Attorney General, Vol. 14, page 17, *supra*; Quarterly Report of Attorney General, Vol. 17, page 85. However, said opinions did not consider the question of notice to the tax assessors and tax collectors by the municipal authorities of the existence of a valid levy.

In the absence of statute, our courts do not take judicial notice of ordinances, laws and by-laws of municipalities.—*Shapiro v. City of Birmingham*, 30 Ala. App. 563, 10 So. (2d) 38; see also 9 Ala. Dig.—Evidence—Key No. 32. Since the courts will not take judicial notice of municipal ordinances, it would be unreasonable to assume that the tax assessors and tax collectors of the various counties of the State were cognizant of the municipal ordinances of the various and sundry municipalities within their counties. To require the tax assessors and tax collectors to ascertain whether or not each municipality within the county had enacted a valid levy for ad valorem taxation would, in my judgment, be placing a burden on these officials not contemplated by law. In my opinion, it is incumbent upon the municipal authorities to properly notify the tax assessors and tax collectors of the county in which the municipalities are situated of the existence of a valid ad valorem tax levy, if said municipality desires these officials to assess and collect the ad valorem taxes on motor vehicles due such municipalities. If such notice is not given, it is my conclusion that the tax assessors and tax collectors would not be responsible for the failure to collect the ad valorem taxes due on said motor vehicles.

In answer to your second inquiry, it is my opinion that the municipal authorities would be responsible for the failure of collecting the ad valorem taxes on motor vehicles due a municipality, in the event there has been a valid levy by the municipality and no proper notice thereof

has been given to the tax assessors and tax collectors of the existence of such levy.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 11, 1947.

Brigadier General James S. Saliba,
The Adjutant General of Alabama,
State Military Department,
Montgomery, Alabama.

Military and Naval Affairs—Athletic Exhibitions—Sales Tax—Exemptions—Act No. 18, General Acts 1939, page 16—Act No. 489, General Acts 1939, page 703—Act No. 628, General Acts 1939, page 995—Title 51, Section 755, Code of Alabama, as amended by Act No. 471, General Acts 1943, page 435—Title 35, Section 65, Title 55, Sections 363 and 364, Title 35, Section 8, Code of Alabama 1940.

Alabama National Guard Units and Alabama State Guard Units are exempt from the payment of sales tax on the gross receipts arising from the staging of Athletic Exhibitions under consideration.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of March 12, 1947, is as follows:

“Request is made as to legality of collection of Alabama Sales Tax on athletic exhibitions sponsored by units of the Alabama National Guard and the Alabama State Guard. This headquarters has received notice from the State Revenue Department that military units may be taxed on the grounds that the Sales Tax Law was enacted since the 1940 Code of Alabama went into effect. We refer you in part to Section 65, Title 35, Code of Alabama 1940 as follows:

“Exhibitions of various kinds and boxing, sparring, wrestling, and athletic matches and contests may be held provided such use does not interfere with the military use of armory or grounds. All revenues derived from the operation of such exhibitions, matches, or contests shall be covered into the proper unit or board

fund. Units of the National Guard shall not be required to obtain any authority, permission, or license from any agency of the state or political subdivision thereof to conduct or hold any such exhibitions and contests so held shall be exempt from the payment of any and every form of license or taxation, either state, county or municipal.'

"Section referred to also states that it shall be the duty of the Adjutant General to foster and enforce rules and regulations governing use of armories and adjacent grounds, leases thereof for such purposes, and admission to be charged therefor; provided, no admission charge to any athletic contests held under authority of section should exceed forty-five cents per person.

"Under provision of Section 8, Title 35, Code of Alabama 1940, authorizing a temporary military force in the absence of the National Guard, you will note that said temporary military force was to be similar to the National Guard and organized for the same stated purposes. This temporary force was to be in lieu of the National Guard toward the preservation of the peace and security of our citizens, and the intent of the law was rightfully that such temporary force should enjoy the rights and privileges exercised by the National Guard.

"We would appreciate an official opinion as to whether Alabama National Guard units and/or Alabama State Guard units are liable for sales tax. When the military code was written it was the intention of the writers that no prevailing or future taxation—state, county or municipal—be imposed upon military units when athletic contests aforementioned were sponsored by units for the financial welfare and interest of individual units concerned."

It is my opinion that both the Alabama National Guard Units and Alabama State Guard Units are exempt from the sales tax under consideration.

It is noted in reviewing the exemptions from sales tax under the provisions of the Sales Tax Act, Act No. 18, General Acts 1939, page 16, approved February 8, 1939, as contained in Section V of said Act, that no exemptions are granted on the gross receipts of naval or military units in the sponsoring of athletic contests or exhibitions. Act No. 18, *supra*, was brought forward into the Code of Alabama 1940 as Title 51, Sections 752-786. Section V of said act appears in the Code of Alabama 1940 as Title 51, Section 755. Neither are such exemptions granted in Act 471, General Acts 1943, page 435, approved July 10, 1943, which amends Section 755, *supra*.

Title 35, Section 65, Code of Alabama 1940, (the Section referred to in your request), is silent as to the applicability of the sales tax to the question of exemption under consideration. However, said section does provide in part as follows:

“* * * Units of the National Guard or Naval Militia shall not be required to obtain any authority, permission, or license from any agency of the state or any political subdivision thereof to conduct or hold any such exhibitions, matches, or contests, or to lease armories or grounds to any person for the holding of such, and all such exhibitions, matches, and contests so held under authority of this chapter shall be exempt from the payment of any and every form of license or taxation, either state, county, or municipal. * * *”

It therefore appears that confusion would arise in determining the true intent of the legislature as to the applicability of the sales tax, where, on the one hand, exemptions of naval or military units are not contained in the exemption clauses of the Sales Tax Law, and, on the other hand, naval or military units are granted exemption from “any and every form of” taxation under the provision of Section 65, supra.

Attention is further called to Act No. 489, General Acts 1939, page 703, approved September 22, 1939. Sections 18-A and 19 of this Act indicate the intent of the legislature that the sales tax shall apply to the subject under consideration. These sections are as follows:

“Section 18-A. Boxing, Sparring and Wrestling Matches and Exhibitions, held in the armory of any National Guard or Naval Militia Unit, under the supervision of the Senior Officer at the station at which the said armory is situated are expressly exempted from the provisions of this Act. At said Matches or Exhibitions in any of said armories, an admission charge or fee of not exceeding forty-five cents may be required of each person so attending, which said admission fees, after payment of reasonable costs of said Exhibitions or Matches, shall be covered into the Company Fund. Provided further: That the units of the National Guard or Naval Militia shall not be required to obtain any authority, permission or license from the Commission created by this Act or from any agency to conduct or hold any such Exhibitions or Matches, and that all such Exhibitions and Matches so held under the authority of this Section shall be exempt from the payment of any and every form of license and taxation, either State, County or Municipal. It shall be the duty of the Adjutant General to promulgate and enforce rules and regulations governing such Exhibitions and Matches.

“Section 19. All laws and parts of laws in conflict herewith, either special or general, except as herein otherwise specially provided, are hereby repealed, provided, that nothing herein shall relieve any person, firm, association, club or corporation from the payment of the tax provided by, or the provisions of an Act of the Legislature, approved February 8th, 1939, known as the Sales Tax Act.” (Emphasis supplied.)

The emphasized portion of Section 19 appears to fix conclusively the applicability of the sales tax to the matter under consideration.

However, in the codification of this act in Title 55, Sections 363 and 364, the following verbiage is used:

"Section 363. Matches and exhibitions exempted.—Boxing, sparring and wrestling matches, and exhibitions, held in the armory of any national guard or naval militia unit, under the supervision of the board of control of such armory are expressly exempted from the provisions of this article. At said matches or exhibitions in any of said armories, an admission charge or fee of not exceeding forty-five cents may be required of each person so attending, which said admission fees, after payment of reasonable costs of said exhibitions or matches, shall be covered into the company fund. Provided further; that the units of the national guard or naval militia shall not be required to obtain any authority, permission or license from the commission created by this article or from any agency to conduct or hold any such exhibitions or matches and that all such Exhibitions and Matches so held under the authority of this section shall be exempt from the payment of any and every form of license or taxation, either state, county or municipal. It shall be the duty of the adjutant general to promulgate and enforce rules and regulations governing such exhibitions and matches.

"Section 364. Sales tax provisions applicable.—Nothing herein shall relieve any person, firm, association, club or corporation from the payment of the tax provided by Article 10 of Chapter 20 of Title 51 except as exempted in the preceding section." (Emphasis supplied.)

Section 364, *supra*, is in direct conflict with the provisions of the original act (Act 489, General Acts 1939, page 703, approved September 22, 1939, *supra*.)

With such confusion existing, I have found it necessary to review the historical background of this subject of legislation. To determine why the Code Committee re-worded Section 19 of Act 489, *supra*, as it did, and wrote into the phraseology of Title 55, Section 364 "except as exempted in the preceding section," I have examined the "Report From Minutes of The Code Committee to Legislature," page 610. The following explanation is given by the Code Committee—referring to Title 55, Section 364, Code of Alabama 1940, (origin, Act No. 489, General Acts 1939, page 703, approved September 22, 1939):

"(1939, Act No. 489.) Add at the end of section the words 'except as exempted in preceding section.' This appears to be the law taking in view Section 69 of the Military Code as amended by Act No. 509, and arrived at after conference before the Commissioner of Revenue and the Adjutant General."

The provisions of the code prevail. Act No. 628, General Acts 1939, page 995, approved July 2, 1940, is the act adopting the code of laws for the State of Alabama. Section 2 of this act provides as follows:

"Section 2. The Code of Alabama as herein adopted shall go into effect and be operative on the thirtieth day after the date of the Governor's Proclamation announcing its publication, and shall govern completely, so far as statutes can, the subjects to which it relates; provided, however, that no statute enacted on or after the twenty-fifth day of June 1940, shall be repealed or affected in any manner by the adoption of this code." (Emphasis supplied).

It is now accepted as settled law in this state that a code is not a mere compilation of laws previously existing, but is a body of laws duly enacted. *State vs. Towery*, 143 Ala. 48, 39 So. 309; *Bush vs. Greer*, 235 Ala. 56, 177 So. 341.

In view of the above, it is my opinion that under the provisions of Title 55, Sections 363 and 364, Code of Alabama 1940, the Alabama National Guard Units are exempt from the payment of sales tax on the gross receipts arising from the staging of athletic exhibitions to which you refer in your inquiry.

Under Title 35, Section 8, Code of Alabama 1940, the Governor is authorized to form "a temporary military force similar to the national guard and organized for the same State purposes." The Alabama State Guard was founded under this section. Therefore, it is my opinion that the conclusion reached above in reference to the exemption of Alabama National Guard Units is applicable to athletic exhibitions to which you refer in your inquiry, which are staged by Alabama State Guard Units.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 17, 1947.

Hon. A. R. Meadows, Superintendent,
Department of Education,
CAPITOL.

Schools—State Board of Education—Act No. 412, General Acts 1945, p. 647.

The State Board of Education has authority to allow a firm accepted by said Board as the depository for the distribution of State school books to "deposit \$50,000 either in cash or in government bonds with an Alabama bank authorized to do trust fund business in Alabama to be held in trust by such bank through an escrow agreement with the State Board of Education until all conditions prescribed by the contract are met," in lieu

of a surety bond required by the bid proposal for the contract to act as such depository.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 24, 1947, is as follows:

"At a meeting of the State Board of Education held in the Department of Education on March 14, 1947, the Board accepted the State Textbook Depository bid of V. J. Elmore, 5c—10c and \$1.00 Stores, Inc., 10 S. 14th Street, Birmingham, Alabama, submitted on Bid Form for Plan Number 1, a copy of which is attached.

"You will observe that Section 10 reads as follows:

"'In case this bid is accepted, the undersigned certifies that he is able to make and will furnish to the State Board of Education a performance bond executed by a surety company qualified to do business in Alabama, in the penal sum of \$50,000 guaranteeing the faithful performance of all items of the Depository contract.'

"The successful bidder through Mr. W. A. Willis, Jr., Secretary-Treasurer, has proposed that in lieu of the bond the V. J. Elmore firm deposit \$50,000 either in cash or in Government bonds with an Alabama bank authorized to do trust fund business in Alabama to be held in trust by such bank through an escrow agreement with the State Board of Education until all conditions prescribed by the contract are met to the satisfaction of said Board.

"I shall appreciate it if you will render an official opinion regarding the legality of his proposal."

In answer to your inquiry, attention is called to Act No. 412, General Acts 1945, p. 647. Section 9 of this Act provides in part as follows:

"It shall be the duty of the State Board of Education to provide for the distribution of textbooks in the State of Alabama by such method and in such manner as said board deems to the best interest of the patrons of the public schools. The State Board of Education shall have the power and authority to purchase textbooks for the public schools of the State; or the State Board of Education may contract for consignment of said books by the publishers to the State to be distributed and sold to the patrons of the public schools by such methods and in such manner as the State Board of Education deems to the best interest of the patrons of the public schools. The State Board of Education shall also have the power and authority

to contract with the publishers for the sale and distribution of textbooks to the patrons of the public schools or may set up from time to time any other regulations or method which the State Board of Education considers will secure the prompt distribution of books at the lowest price to the patrons of the public schools of the State; * * * *

It will be seen from the above statute that the State Board of Education may provide for the distribution of textbooks in the State of Alabama by such method and in such manner as it deems to the best interest of the patrons of the public schools.

Acting under the authority of Section 9, supra, the State Board of Education deemed it advisable to provide for the distribution of school books in the State through a State depository, and accepted the bid under consideration. Section 10 of the bid proposal to act as such depository (a copy of which is attached to your request) is as follows:

"10. In case this bid is accepted, the undersigned certifies that he is able to make and will furnish the State Board of Education a performance bond, executed by a surety company qualified to do business in Alabama, in the penal sum of \$50,000.00 guaranteeing the faithful performance of all items of the Depository contract."

Act No. 412, supra, contains no provision requiring a State depository for the distribution of State school books to furnish a performance bond or other security to act as such depository. However, under the broad provisions of Section 9, supra, the State Board of Education, if it deems advisable, may require that such depository furnish a surety bond or other security guaranteeing the faithful performance of the contract to act as State depository for distribution of textbooks to the public schools in Alabama.

Answering your inquiry, it is my opinion that the State Board of Education has authority to allow the firm accepted by the Board as the depository for the distribution of State school books to "deposit \$50,000 either in cash or in government bonds with an Alabama bank authorized to do trust fund business in Alabama to be held in trust by such bank through an escrow agreement with the State Board of Education until all conditions prescribed by the contract are met," in lieu of the surety bond required by the bid proposal for the contract to act as such depository.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 17, 1947.

Honorable I. C. Kuykendall,
Superintendent of Education,
Pickens County,
Carrollton, Alabama.

Schools—County Board of Education—Title 52, Section 99,
Code of Alabama 1940.

Under the authority of Title 52, Section 99, Code of Alabama 1940, a county board of education may lawfully expend county school funds for the purpose of curing a defect in title to property formerly used for school purposes but now being disposed of as surplus property.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of March 14, 1947, is as follows:

“Please advise me at your earliest convenience whether the Board of Education of Pickens County can make an expenditure out of the school funds to cure a defect in the title to property formerly used for school purposes but which is being disposed of as surplus property.”

It is my opinion that the Board of Education of Pickens County may lawfully expend county school funds for the purpose of curing a defect in the title to property formerly used for school purposes but which is now being disposed of as surplus property.

Under the provisions of Title 52, Section 62, Code of Alabama 1940, the general administration and supervision of the public schools and the educational interests of each county, with the exception of cities having a city board of education, is vested in the county board of education. The effect of this section is to delegate to the county board of education complete control of the educational affairs of the county, except as otherwise provided by law. Biennial Report of Attorney General, 1934-36, page 263.

The decisions of the appellate courts of Alabama are to the same effect. In the case of *State ex rel King, et al. vs. County Board of Education of Russell County*, 214 Ala. 620, 108 So. 588, the court said:

“The general administration and supervision of the public schools and of the educational interest of each county (with exceptions not here necessary to specify) is vested in the county board of education,

(section 77, School Code), and numerous provisions of our statutes disclose the very broad latitude of authority granted to such board. Such boards are vested with a very broad discretion. **Christian vs. Jones**, 211 Ala. 161, 100 So. 99, 32 A. L. R. 1340."

It has likewise been stated by the appellate courts that a county board of education is a quasi corporation, an independent agency of the state for the purposes enumerated in the statutes, with the authority to exercise those powers which are expressly conferred upon it, or are necessarily incident thereto. **Kimmons vs. Jefferson County Board of Education**, 204 Ala. 384, 85 So. 744; **Dean vs. County Board of Education**, 210 Ala. 256, 97 So. 741; **Greeson Mfg. Co. vs. County Board of Education**, 217 Ala. 565, 117 So. 163; **County Board of Education vs. Slaughter**, 230 Ala. 229, 160 So. 758.

Title 52, Section 71, Code of Alabama 1940, provides as follows:

"Property vested in county board.—All the property, estate, effects, money, funds, claims, and donations now or hereafter vested by law in the public school authorities of any county for the benefit of the public schools of any county are hereby transferred and vested in the county board of education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular county, school district, or public school, shall be held in trust by the county board of education for the benefit of any such county school district or school."

It will be noted from the above quoted statute that all property, effects, money, funds, claims and donations now or hereafter vested by law in the public school authorities of any county, for the benefit of the public schools of such county, are transferred to and vested in the county board of education.

Title 52, Section 99, Code of Alabama 1940, defining the powers of a county board of education, provides as follows:

"Powers of county board.—The county Board of Education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the board and spread upon its minutes. All processes shall be executed by service on the executive officer of the board."

It will be noted that this statute specifically provides that the county board of education is authorized and empowered to "transmit and convey the title to real and personal property for school purposes." Quarterly Report of Attorney General, Vol. 22, p. 149.

The powers and authority delegated to the county board of education by the above statutes do not specifically provide for an expenditure of county school funds for the purpose under consideration. Such authority, if conferred at all, must be implied from the express authority granted in Title 52, Section 99, *supra*. The rule governing construction of statutes of this nature is found in 59 C. J. Statutes, Section 575, as follows:

"A statutory grant of a power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, * * *." Cf. Biennial Report of Attorney General, 1934-36, page 263.

It has been held by our courts, as indicated *supra*, that a county board of education is vested with the authority to exercise those powers which are expressly conferred upon it, or are necessarily incident thereto.

It is my opinion that the curing of a defect in the title of school property being disposed of as surplus property, is an incident to the sale of such property, and that, in view of the fact that the county board of education is specifically authorized to convey title to such property, county school funds may be lawfully expended for the curing of a defect in the title of the property under consideration.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 21, 1947.

Honorable Pat Byrne,
Commissioners of Licenses,
Mobile County,
Mobile, Alabama.

Licenses—Hearing Aids—Title 51, Section 578, Code of Alabama 1940—

1. Hearing aids are not "radios" or "receiving or transmitting machines" within meaning of Title 51, Section 578, Code of Alabama 1940.

2. Sellers of "hearing aids" are not subject to state or county license.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of March 29, 1947, is as follows:

"I would like to have your official opinion on the following question:

"Is a person who sells hearing aids liable for a State and County license under Section 578 of the Revenue Code?

"If your answer is in the negative, please advise if such person is liable for any State and County license."

Title 51, Section 578, Code of Alabama 1940, provides in part as follows:

"Every person engaged in the business of selling radios or other receiving or transmitting machines, shall pay the following annual privilege tax: * * *"

A radio is an instrument for reproducing sound transmitted on an electrical wave from a radio broadcasting station and intercepted by a radio receiver which re-transmits the sound through ear phones or through the medium of a loud speaker.

A hearing aid is an instrument for the electrical and mechanical amplification of sound waves, which are vibrational energy propagated by progressive longitudinal vibratory disturbances of the atmosphere.

Sound waves travel through the atmosphere; radio waves travel through the ether. It is therefore my opinion that "hearing aids" are not "radios" or "receiving or transmitting machines" within the meaning of section 578, supra. I construe this section to cover only such machines as receive and transmit radio waves, not sound waves alone. Insofar as I know, hearing aids do not intercept radio waves.

Your first question is therefore answered in the negative.

Moreover, I find no other statutory provision which requires a state or county license of a seller of hearing aids. Therefore, your second question is likewise answered in the negative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 21, 1947.

Hon. Ralph P. Eagerton,
Chief Examiner of Accounts,
Department of Finance,
CAPITOL.

Circuit Clerk—Photostat Machines.—Title 13, Section 198,
Code of Alabama 1940.

The circuit clerk of a county with a population under four hundred thousand cannot record by photostat machine, the recording required under Title 13, Section 198, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of April 7, 1947, is as follows:

"We have a request from a Circuit Clerk in one of the small counties of the State for an opinion as to whether it would be legal for him to use a photostat machine for recording. This county has bought a photostat machine and it is now in use by the Probate Judge in his office.

"Title 13, Section 198 authorizes counties of four hundred thousand or more population to record with a photostat machine.

"Please give me your official opinion on the following question:

"Can a Circuit Clerk in a county with a population under four hundred thousand record by photostat machine, the recording required under Title 13, Section 198?"

It is my opinion that your inquiry should be answered in the negative. Title 13, Section 198, Code of Alabama 1940, enumerates the duties of the clerks of circuit courts. Said section contains the following provision:

"* * * In the circuit court in counties having a population of four hundred thousand or more according to the last or any subsequent federal census, the documents required to be recorded under this section may be recorded by means of a photograph or photostat machine. In such counties, it shall not be necessary that the documents in a particular case shall be recorded in assembled or collected fashion; that is to say, it shall not be necessary that the documents in a particular case be recorded upon pages in continuous numerical sequence; and, on the contrary, it shall be a sufficient compliance with the provisions of this section or any other provision of law requiring

recording, that the documents are anywhere recorded in the record books. When in such counties, the record of documents in a particular case is not kept in assembled or collected fashion, the clerk shall note on the trial docket, or other appropriate docket, and also on the original document recorded, the book number and page number where each particular document is recorded; and shall upon the filling up of any record book place a list in the front of the book showing in numerical order the docket numbers of each and every case whose documents have been recorded in the book, and showing alongside the docket numbers respectively the page or pages in the book where the documents in a particular numbered case are recorded." (Emphasis supplied.)

The above provision of Section 198 clearly allows the clerk of the circuit court to use a photostat machine in counties having a population of four hundred thousand or more. Since the subject was obviously considered by the legislature in dealing with the general law, it is equally clear that the applicability of the provision noted was intended to extend only to counties having a population of four hundred thousand or more. It is evident that the legislature considered that the volume of work falling upon the clerk of the circuit court in such large counties warranted the use of a photostat machine to expedite work required in recording documents. No reference is made to the use of a machine in counties of less than four hundred thousand population; nor does a review of our statutory law reveal any statute authorizing the use of such a machine by clerks of the circuit court in counties of less population.

Accordingly, under existing law, a circuit clerk in a county with a population under four hundred thousand cannot record by photostat machine, the recording required under Title 13, Section 198, Code of Alabama 1940.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

April 22, 1947.

Honorable George C. Wallace,
Member Finance Committee,
Legislature of Alabama.

Statutes — Constitutionality — Veterans — Housing projects —
Constitution of Alabama 1901, Section 93, as amended.

1. The state exists for the purpose of promoting, protecting, and securing the welfare, peace, happiness, and prosperity of its citizens.

2. The legislature is the agent of the people of the State

and may enact any law the people, as a whole, could pass unless inhibited by the Constitution of the State formed by them or by the Federal Constitution they adopted.

3. When the legislature is enacting laws for the general good and welfare of the people, it is acting under its police power and performing duties falling within its governmental powers or capacities as distinguished from its proprietary or business capacity, and Section 93 of the State Constitution of Alabama 1901, as amended, constitutes no inhibition against such legislation.

4. When there exists conditions showing an acute shortage of dwelling houses in the State, the legislature, under its police powers and for the dominant purpose of relieving such an emergency, may pass laws to construct houses for rental to veterans, and appropriate public funds therefor, if available in the treasury, or it may provide that the project be self liquidating and without the State's general liability or credit.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your communication seeking an opinion of this office poses the following questions:

1. Has the legislature power to enact a statute providing for the construction of houses to be rented to war veterans of World War II?

2. If this may be done, what should be the form and character of such a statute?

The solution of your first question demands some inquiry into the philosophy of our principle of government, its functions, and the nature and limitations of legislative powers vested in the legislature. It is a settled principle in American Jurisprudence that the people are sovereign, and that prior to the formation of our present state and federal governments, had unlimited power to form such governments as they saw fit. In this country they are known as states—bodies politic. The people saw fit to form a representative sovereignty and vest it with all the powers the people had, and the legislative body was vested with all the powers of the sovereign to make laws. The people committed to the legislature the whole law making power of the state, which they did not expressly or impliedly withhold. These principles have been discussed and declared so often and so long that it is hardly necessary to cite authority. *Dorman vs. State*, 34 Ala. 216; *Opinion of the Justices*, 247 Ala. 195; *Opinion of the Justices*, 247 Ala. 66; 49 American Jurisprudence, States and Territories, Sections 33 and 36; *First Cooley, Constitutional Limitations* (8 ed.), page 175.

The state exists for the purpose of promoting the welfare, peace, happiness and prosperity of its citizens. Its duties are to provide for their security and protect them in the enjoyment of the comforts and conveniences, which they are taxed to provide. The state government is charged with the duty of promoting this purpose. It is the guardian and trustee of its citizens. In the performances of these duties, it acts both in its governmental or sovereign capacity, and in its proprietary capacity. 49 *American Jurisprudence*, States and Territories, Section 8. To carry out these duties, the legislature, unless restricted by the constitution, may establish a system or systems for the administration of these public duties. 49 *American Jurisprudence*, States and Territories, Section 38.

In legislating for the general welfare of the people, the Legislature is exercising its police power which is inherent in the sovereign. Such power is generally regarded as a reserved power and not a delegated power. In effect, it sums up the whole power of government. The very existence of government, as well as the security of society, order, life and health of the citizens, is dependent on such power. It is not susceptible to circumstantial precision because there cannot be foreseen changing conditions calling for its exercise. 11 *American Jurisprudence*, Constitutional Law, Sections 245-246; *Opinion of the Justices*, 247 Ala. 66. It possesses such elasticity as to be applied to the change of economical and social demands of the people.

In the light of the foregoing principles, I come to the consideration of the question whether there are any federal or state constitutional provisions prohibiting or limiting the power of the legislature to enact the statute under consideration. Confessedly, there is nothing in the character of the proposed statute that runs counter to the Federal Constitution. The Constitution of Alabama 1901, Section 93, as amended in part as follows:

"The State shall not engage in works of internal improvement nor lend money or its credit in aid of such; nor shall the State be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation."

Before entering upon a detailed analysis of this constitutional provision, I shall undertake to show what is meant by the word "corporation" as used in this constitutional provision. Our Supreme Court holds that the word "corporation" here used means a private corporation and not a public corporation. *Alabama State Bridge Corporation vs. Smith*, 217 Ala. 311, 116 So. 695. A public corporation is defined to be the embodiment of political power for the purpose of public government. *Webster vs. Plymouth*, 62 N. H. 193, 208. A housing authority has been defined to be a public corporation. *Smith vs. Citizens Saving Bank*, 2 N. Y. S. 213, 214. It is a corporation created for public purposes as an instrument or agency to increase the efficiency of government to supply public wants and promote public welfare. *People ex rel Rogers vs. Let-*

ford, 102 Col. 284, 79 Pac. 2d, 274, 281. Public purpose as here used is synonymous with governmental purpose. It must follow that Section 93, supra, has no application or inhibition against a public corporation created by the legislature to administer some part of the governmental functions of the state.

In construing a statute or constitutional provision, the pole star for guidance is the intent and purpose of the provision. If the ordinary and popular meaning is given to "internal improvements" used in Section 93, supra, is to control, then that phrase would lead dangerously near to absurd results. The State would be without power to rebuild the State Capitol in case of destruction, or to build and operate state penitentiaries, state universities, etc. Confessedly, neither the framers of this constitutional section nor the people voting for it intended such results. The State could not survive such a blow.

The legislature, in submitting the provision to a vote of the people, must be presumed to know the law and the general principle of our government. It is a cardinal principle that our state government acts in two distinct capacities; one in a governmental capacity, and the other in a proprietary capacity. In the former, the government is discharging matters strictly necessary or proper to the on-going of the government, and is discharging its duty to promote the general welfare, peace, happiness, and prosperity of its citizens. In the latter capacity, the government is acting in a business capacity for financial gain and in competition with the citizens of the State. To my mind, it is clear that the provision of Section 93 of the Constitution was intended to forbid the State from engaging in internal improvements, lending its money or its credit in aid of such internal improvements, as that term is ordinarily understood or used. It was not intended to apply to the acts of the government in discharging its fundamental duties to preserve and protect public good and public welfare of the citizens. That is to say, it was not intended to apply to the acts of the government, acting in the discharge of public functions, but rather to prevent the State from engaging in such internal improvements in its business or proprietary capacity in competition with private citizens. An examination of the history of the times just preceding the adoption of Section 93, supra, will fully justify our conclusions. The correctness of this view is strengthened by what immediately follows. The phrase "internal improvement, nor lend money or its credit in aid of such," shows that the section was intended to forbid the State from entering into the **business** of internal improvements or aid individuals engaged in internal improvements.

I find that this question has come before many courts where the states had similar or kindred inhibitions, and they held that the term "engaging in internal improvements" does not apply to the state where it is in the exercise of its governmental capacity. In the case of *Rippe vs. Becker*, 56 Minn. 100, 57 N. W. 331, the Supreme Court of Minnesota reviewed the question at length. The holding of the court is well stated in the last headnote as follows: "Works of internal improvement as used in the constitution means not merely the construction or improvement

of channels of trade and commerce but any kind of public works except those used by and for the State in the performance of its governmental functions, such as the State Capitol, State Universities, Penitentiaries, Reformatories, Asylums, Quarantine Buildings, and the like for the purpose of education, prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government." (Emphasis supplied.)

The case of *In Re Internal Improvement Fund*, 24 Col. 247, 249, 48 Pac. 807-808, in principle, holds to the same effect. Many other cases out of this state support these views.

I shall now consider two recent Alabama cases. These cases were not using the same line of approach to the question as I have herein set forth, but reach, beyond dispute, the same end. In the case of *In Re Opinion of the Justices*, 247 Ala. 66, 22 So. 2d 521, the court was construing Act No. 32, General Acts 1943, page 25. This Act created the Alabama State Market Board, vested with power to acquire by purchase, donation, lease or condemnation, for and in the name of the State of Alabama, a suitable site or sites, and to erect and install thereon structures, facilities, and equipment. (See Section 3 of the Act.) Section 6 of the Act, for the purpose of carrying out the provisions thereof, appropriated a sum not to exceed three hundred thousand dollars out of the Agricultural Fund and the general funds of the State. Section 8 of the Act requires that all survey and engineering is to be rendered by and under the supervision of the State Highway Department. The constitutionality of this Act was submitted to the Supreme Court, and it held that the construction of market facilities by the Board created by the Act is not engaging in works of internal improvement by the Board within the contemplation of Section 93 of the Constitution of 1901, as amended; that sections 3 and 6 of the Act do not have the effect of engaging the State in works of internal improvement; that the carrying out of the provisions of the Act by the State does not make the State interested in any private or corporate enterprise in violation of Section 93 of the Constitution of 1901, as amended. Immediately following the above, the Court declared: "We reach these conclusions because we consider the authority granted by the aforesaid Act is within the police power of the State." Continuing, the Court said that it had heretofore refused to place a limit on the police power of the State because it represents the State's great reserve power and is at all times co-extensive with the necessities of the case and a safe guard of the public interest. Much more is declared by the Court in support of these principles. It discusses the evils at which Section 93 of the Constitution is directed.

If this decision is not to lead to a collision with Section 93 of the Constitution, as amended, it must be construed as holding that in such matters as set forth in the enactment, the legislature was acting within its police powers in the performance of a public function of the sovereign state. Confessedly, the Act appropriates public funds, and it did give financial aid and other state aid to the project.

The next case is *Opinion of the Justices*, 247 Ala. 195, 23 So. 2d 505. Here the court had been requested for an opinion on the constitutionality of Act No. 281, General Acts 1945, pages 437, et seq. This is a long and involved enactment and I have limited notice of its provisions to bare essentials. It incorporated a public corporation to be known as "The Alabama Public Hunting and Forestry Association, Inc." It stated the purpose of the corporation to be for the promotion of health, safety, comfort, and general welfare of the people through the acquisition of lands by purchase, gift, or otherwise, suitable for hunting, fishing, recreation, or forestry purposes. Section 13 of the Act appropriated use of the general funds of the State construed by the Court in the case to be one hundred thousand dollars. The Court held that the public corporation created by the Act, and the performance of the duties imposed upon the corporation, did not cause the State to be engaged in works of internal improvements in violation of Section 93 of the Constitution, as amended, and it further held that if the condition of the state treasury permitted, the Governor could legally authorize the State Comptroller to draw his warrant for the sum appropriated by the Act. In discussing the questions, the Court declared that the purpose of the Act was to promote the health, comfort, safety, and general welfare of the people of the State through the acquisition of lands for hunting and fishing preserves, and that the general purpose of the Act was within the police powers of the State. Further, that the Act does not contemplate a prohibited internal improvement, nor is it to be interpreted as authorizing the State to engage in dealing in real estate or its products in any way on a competitive basis with private enterprise, but that the Act must be read as being reasonably related to the expressed purposes of the corporation in the public interests and the public good. Clearly, this Act appropriates one hundred thousand dollars to be paid out of the general funds of the State. If engaging in works of internal improvement or lending money or the State's credit in aid of the same is to be given its ordinary or popular meaning, the Court has had a head-on collision with Section 93 of the Constitution.

The only way to save the holding of the Court is to construe that Section 93 of the Constitution has no application where the legislature is acting within its police power primarily for the purpose of protecting and caring for the general welfare of the citizens, and that the section is leveled at State action, State interests, or State aid to private business or private individuals, or, to state it more accurately, acting in its business or proprietary capacity. An examination of the history of the times when Section 93 was incorporated as Section 54 of the Constitution of Alabama 1875 will confirm my holding.

This subject is forcibly discussed in *Brumbly vs. Baxter*, 225 N. C. 691, 36 N. E. 2d 281, 162 A. L. R. 930, and *Opinion of the Justices*, 67 N. E. 2d 588, 165 A. L. R. 807.

In this last case, the Supreme Judicial Court of Massachusetts had before it the identical question here submitted by you. The annotator

in 165 A. L. R., supra, states that this is the only case to be found where the courts have construed such an act. I have examined the authorities from the date of the opinion in this case (1946) to the present and find no other case. The Massachusetts case held the act valid. The court treated the act as one where the legislature was dealing with public welfare and for public purposes. I will only note briefly some of its holdings. They are well stated in the head-notes.

"1. The dominant purpose of a proposed statute authorizing the expenditure of public monies to provide housing for war veterans and their families in an existing condition in an acute shortage of houses is a recognition of public service performed by such veterans and the purpose is, therefore, a public one, not withstanding the incidental benefit to individuals."

"4. Where a proposed governmental expenditure may in some respects result in conferring benefit upon the public and in other respects in conferring a benefit upon or in paying money to private individuals, its permissibility must depend upon whether the public benefit is the primary result."

"5. In determining whether a governmental expenditure is for a public purpose and, therefore permissible, or for a private purpose, which is not permissible, each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects public welfare."

From the foregoing authorities and considerations, it is, to my mind, entirely clear that where the legislature is enacting laws within the sweep of the police powers, primarily for the public good and general welfare of the citizens, without any direct purpose to earn a profit therefrom, it is exercising governmental functions, and is not engaged in works of internal improvement or giving aid or credit to such improvements within the meaning of Section 93 of the Constitution of 1901, as amended.

It is my opinion that a law enacted primarily for the construction of housing projects for war veterans of the recent World War in an existing condition of an acute shortage of houses is a legislative enactment performed under the police powers of the legislature in the performance of governmental functions.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 24, 1947.

Hon. William M. Kelly,
Chief Attorney,
Veterans Administration,
Montgomery, Alabama.

Veterans—Guardian and Ward—Title 21, Sections 160 and 174, Code of Alabama 1940—General Act 1931, page 280.

1. Any applicant for benefits made available by the Veterans Administration or any person acting on his behalf, or the representative of the Veterans Administration, is entitled to be furnished with certified copies of public records, without charge, by the official charged with the custody of such public records, whenever such records are required by the Veterans Administration to be used in determining the eligibility of the applicant to participate in benefits made available by the Veterans Administration.

2. Quarterly Report of Attorney General, Vol. 42, page 13, insofar as it conflicts with the holding herein expressed, is hereby overruled. Also all other opinions of this office heretofore rendered that may conflict with the holding herein expressed are hereby expressly overruled.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of February 18, 1947, is as follows:

“Reference is made to various opinions of the Attorney General’s office construing Section 174, Title 21, Code of Alabama, 1940. Such opinions deal with the questions of, the nature of the records required to be furnished under said section of the code, the number of copies required to be furnished and to whom said officials are required to furnish said records.

“The opinion of the Attorney General of December 14, 1936, to Honorable Eugene H. Hawkins, Judge of Probate of Jefferson County, Alabama, (Biennial Reports 1936-1938, Page 65) makes it clear what records are required to be furnished under said section of the code and the opinion of May 28, 1945, to the Acting Director of the Bureau of Vital Statistics (Quarterly Reports, Vol. 39, Page 31) makes it clear as to the number of copies that are required to be furnished but it is not clear in my mind as to whom said officials are required by such section of the code to furnish these records in view of the apparent conflict on this question in an opinion rendered by the Attorney General to Honorable B. F. Austin, State Health Officer on April 12, 1943, (Quarterly Reports, Vol. 31,

page 15) and in the opinion rendered on January 9, 1946, to Honorable John T. Frazer, Judge of Probate of Lee County, Alabama, (Quarterly Reports, Vol. 42, Page 13).

"I had interpreted the opinion to Dr. Austin as holding that any person was entitled to a certified copy of said records when such records were required for the purpose set out in said section of the code. However, the opinion rendered on January 9, 1946, to Judge Frazer appears to limit the furnishing of said records only to cases involving guardianships of incompetent veterans and of minor children of disabled or deceased veterans.

"I would appreciate a clarification by you of the question as to whom said records are required to be furnished free of charge. I understand that certified copies of said records are to be furnished only when they are required by said bureau for the purpose of determining the eligibility to participate in benefits made available by the bureau."

Title 21, Chapter 8, Code of Alabama 1940, constitutes what is commonly referred to as the "Uniform Veterans' Guardianship Act." This Act (Act No. 240, General Acts 1931, page 280, approved June 6, 1931), was brought forward into the Code of Alabama 1940 in substantially its original form, and is now codified in its original form, with certain amendments passed by the 1936-1937 Legislature, which amendments are not here pertinent. Said Act now appears as Chapter 8 of Title 21, Code of Alabama 1940, which Title covers the subject of guardian and ward. Section 18 of Act No. 240, *supra*, provides that the Act may be cited as the "Uniform Veterans' Guardianship Act."

The "Uniform Veterans' Guardianship Act" was adopted by the National Conference of Commissioners on Uniform State Laws in July, 1928, recommended for enactment in all the states, and was approved by The American Bar Association in July, 1928.

Within a relatively short time thereafter it was adopted literally, or in its essential parts in thirty-five states, and has since, with certain amendments, been adopted by most, if not all, of the remaining states. The many varied benefits administered by the Veterans Administration to veterans and their families and dependents throughout the forty-eight states soon gave rise to the desire, if not the necessity, for a uniform practice, and for the need of uniform legislation on the subject which would provide greater security to the nation's disabled veterans and minor wards, and which would enable the States Courts and the Veterans Administration, acting in cooperation, to insure that the benefits paid on account of such wards will inure solely to their use and will not be dissipated through ill-advised actions of fiduciaries. For such purpose Alabama united with the other states in adopting this Act.

Section 1 of the 1931 Act, *supra*, was carried forward into the Code of Alabama 1940 and codified as Section 160 of Title 21, and Section

14 of said Act was codified verbatim as Section 174 of Title 21.

Title 21, Section 174, Code of Alabama 1940, is as follows:

"Sec. 174. Copies of records to determine eligibility for benefits.—Whenever a copy of any public record is required by the bureau to be used in determining the eligibility of any person to participate in benefits made available by such bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such bureau with a certified copy of such record."

The term "ward" is defined in Section 160, *supra*, as meaning a beneficiary of the Bureau. The term "benefit" is defined in said Section as meaning all moneys payable by the United States through the Bureau.

Section 17 of Act No. 240, *supra*, is as follows:

"This act shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the Bureau."

Therefore, it is clear that the Act applies to beneficiaries of the Bureau (now to beneficiaries of the Veterans Administration, successor to said Bureau). The benefits payable by the United States through the Veterans Administration, as a matter of common knowledge, consist of many benefits in addition to those confined to cases of guardianships of incompetent veterans and of minor children of disabled or deceased veterans.

Certified copies of various public records are required by the Veterans Administration in order to determine the eligibility of persons to participate in benefits made available by the Veterans Administration, and when such records are required by the Veterans Administration for such purpose, they should be furnished free of charge in accordance with said Section 174, *supra*. Therefore, it is my opinion that any person making an application for said benefits, or any person acting on his behalf, or the representative of the Veterans Administration, is entitled to be furnished, free of charge, with certified copies of said records when they are required by the Veterans Administration to be used in determining any person's eligibility to participate in benefits made available by the Veterans Administration.

The official charged with the custody of such records may require evidence that the applicant desires certified copies of said records for the purpose of establishing his right to said benefits, and that such records are required by the Veterans Administration for such purpose.

It appears to me that it was proper and logical that Act No. 240, *supra*, ("Uniform Veterans' Guardianship Act") should have been codified, or embodied in the 1940 Code at exactly its present location, and that in doing so I see no reason why that fact limited the provisions of said

Section 174, supra, and made them applicable only to guardianship cases of incompetent veterans and of minor children of disabled or deceased veterans, when to do so would run counter to the clear and simple language of said Section 174 quoted above. While the constitutionality of this Act is not raised, should it be contended that, to hold that said Section 174 applied to instances or cases other than "guardianships of incompetent veterans and of minor children of disabled or deceased veterans," said Act would be unconstitutional because the subject matter of said Section 174 was not expressed in the title of the original act, the answer would be that such an objection is not now available because said Act was a part of the 1940 Code when said Code was adopted, the rule being "all infirmities of legislative procedure in the passage of a bill are cured by its adoption as a part of the Code." *Bales v. The State*, 63 Ala. 30 (34); *Bluthenthal and Vickert v. Trager and Co. et al*, 131 Ala. 639, 31 So. 622.

The opinion of this office in Quarterly Report of Attorney General, Volume 42, page 13, insofar as it conflicts with the holding herein expressed, is hereby overruled. Also all other opinions of this office heretofore rendered that may conflict with the holding herein expressed are hereby expressly overruled.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 24, 1947.

Hon. Thomas L. Holley,
State and County License Inspector,
Mobile County,
Mobile, Alabama.

Licenses: A street fair or carnival that does not maintain its permanent winter quarters in Alabama is not entitled to the exemption provisions of Section 486, Title 51, Code of Alabama 1940.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion bearing date of April 8, 1947, is as follows:

"Please render to me an official opinion as to whether or not the following described business is subject to the license or privilege tax levied by sections 486 and 597, Title 51, Code of Alabama 1940, during the operation or conduct of such business for the first four weeks' performance in this State.

"Said business is known as the Calvacade of Amusements and is operated or conducted by a Mr. Al Wagner. A part of the business has wintered at or near Mobile, Alabama, during approximately the last six winters. The part of the above business that has wintered last year is composed of approximately fifty railroad cars, thirty-five wagons, one ferris wheel, one merry-go-round, and sundry other types of show equipment. During the month of March, 1946, various operators of carnival concessions, consisting of entertainments, magicians, ball-throwing contests, feats of strength, and exhibitions came into this State from other parts of the country and contracted with Mr. Wagner to operate concessions under his supervision in a tour within this State. The contract provided that the concession operator should turn over to Mr. Wagner a certain percentage of the gross intake of the concession in exchange for Mr. Wagner's furnishing electric power, transportation, and any licenses or taxes that might be due. The number of concession operators coming into this State and joining up with Mr. Wagner is approximately sixty. The only concession owned and operated directly by Mr. Wagner is one ferris wheel and one merry-go-round. This business under Mr. Wagner's supervision is engaged in travelling within this State from city to city and operating at each stopping point what is commonly and popularly termed a street fair or carnival. There is not attached or connected with this business any menagerie or "big top," except about four monkeys in a side show. Mr. Wagner assessed his property located in Mobile County for the tax year commencing October 1, 1946, and ending September 30, 1947, for the sum of \$10,000.00, and has already paid such tax thereon. Mr. Wagner asserts that he is a citizen of this State. The total value of all of the property which is a part of the business at this time is approximately \$200,000.00. This includes the concessions, rides and shows, that have been attached to this business from out of this State.

"Attention is called to the proviso of Section 486, *supra*, that exempts a street fair or carnival from taxation under Title 51 during the first four weeks' rehearsal performance in this State, if certain stipulated conditions are fulfilled."

It is my opinion that the operator or person conducting a business as you describe is liable for the license levied by Section 597, Title 51, Code of Alabama 1940, and is not a circus but a carnival or street fair.

The basis of my opinion in this regard is that the street fair or carnival described by you did not winter in Alabama nor does it maintain its permanent winter quarters in Alabama. Only a small part of the business wintered in Alabama. An operator cannot claim exemption under the proviso of Section 486 unless the business he operates has wintered in this State. It is not possible for the headquarters of a street fair or carnival to winter in the State and then to extend the exemption from license tax to the concessions that unite with it after the close of winter quarters. Only a small part of the property has been assessed

for ad valorem taxes to this State. Quarterly Report Attorney General, April-June, 1938, p. 130.

The proviso of Section 486, *supra*, is as follows:

"Provided that to the end that there may be no double taxation or license charged by this State, that the terms of this title shall not apply to the operation or conduct of any street fair or carnival for the first four weeks' rehearsal performance after closing of winter quarters in this State, owned by any citizen of this State or by any corporation organized under the laws of this State and having its principal situs in Alabama and maintaining its permanent winter quarters in Alabama, whose property is subject to and pays to the State of Alabama a tax on its real and personal property under any law of this State."

There is a real doubt that this proviso extends the exemption to street fairs and carnivals that are not a part of a circus. But it is unnecessary to go into this question since the street fair or carnival described in your letter does not under any theory fall within the exemption of Section 486, *supra*.

It is my opinion that Mr. Al Wagner is liable for the license levied under Section 597, *supra*, and that criminal proceedings are justified if he fails or refuses to procure such license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 30, 1947.

Hon. C. E. McNatt,
Clerk, Circuit Court,
Franklin County,
Russellville, Alabama.

COSTS AND FEES—FINE AND FORFEITURE

**FUND—CLERKS—SHERIFFS—TITLE 11, SECTION 83(d)
CODE OF ALABAMA 1940.**

Where a defendant is convicted of a felony and appeals to the Supreme Court and pending appeal he escapes from the county jail, the fees of the sheriff and clerk may be paid out of the fine and forfeiture fund of the county under the provisions of Title 11, Section 83(d), Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 17, 1947, is as follows:

"One Berryhill Cooper was indicted, convicted and sentenced to life imprisonment in the state penitentiary in the Circuit Court of Franklin County on May 16, 1938. On said date the defendant gave notice of an appeal to the Supreme Court of Alabama and the said sentence and judgment of conviction were suspended pending the appeal to the Supreme Court. While the case was pending in the Supreme Court, the said defendant escaped from the Franklin County Jail, where he was in the custody of the sheriff on said offense. Said Defendant has never been apprehended and is now a fugitive from justice and has been a fugitive from justice continuously since he escaped from the county jail. On Jan. 18, 1940, the said appeal was dismissed by the Supreme Court for the reason that the appellant was a fugitive from justice. I, as Clerk of the Circuit Court have never drawn any costs in the Circuit Court or costs for preparing the transcript of appeal. Please advise me how I can collect the costs accrued to the clerk in this case? Should it be paid by the Department of Corrections and Institutions or the fine and forfeiture fund of the county? How can the sheriff collect his cost in the case?"

As a supplement to your request, you have forwarded to this office a copy of the judgment entry in the case of State of Alabama No. 8111 v. Berryhill Cooper. It appears from this judgment entry that judgment for the costs of this proceeding was properly entered against the defendant, the judgment being entered in accordance with the provisions of Title 11, Section 83(d), Code of Alabama 1940, which reads as follows:

"The fees specified in this article are to be collected and paid as follows: * * * (d) in all cases in which the defendant is convicted for a felony, fees for services rendered must be taxed and judgment rendered against the defendant therefor and paid by the state to the extent as provided by law, and all other fees of sheriffs, clerks of court and state's witnesses not paid by the state shall be claims against the fine and forfeiture fund in the event an execution against the defendant is returned 'no property found' and such claims are evidenced as required by law;"

It is to be noted from the above quoted statutory provision that, in all cases in which the defendant is convicted of a felony, the fees for services rendered must be taxed and judgment rendered against the defendant therefor, and all fees of sheriffs and clerks not paid by the State shall be claims against the fine and forfeiture fund of the County

in event an execution is issued against the defendant and returned "no property found."

Your attention is invited to Title 45, Section 72, Code of Alabama 1940, wherein it is provided that the State cannot pay any costs out of the convict fund unless the defendant is actually delivered to the penitentiary officials. Since it appears from your request that this defendant has escaped and is still at large, it is impossible to deliver his person to the penitentiary officials. This being true, the State cannot pay any of the costs of this proceeding out of the convict fund.

Therefore, upon a return of execution "no property found" against the defendant, the fees of the sheriff and clerk may be legally collected from the fine and forfeiture fund of the county upon claims evidenced as required by law.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

May 2, 1947.

Honorable Henry W. Sweet, Director,
State Docks and Terminals,
Mobile 4, Alabama.

Docks Commission—Docks Personnel Officer—Merit System—
Title 55, Sections 297, 299, 300, 303, and 304, Code of Alabama
1940—Rules V and VI of the State Personnel Board.

1. Under the job specification established for the Docks Personnel Officer under the provisions of the Merit System Law, such officer must perform personnel functions for the Department of State Docks and Terminals, including the Railway Terminal Division thereof, and related work as required by the Director of State Docks and Terminals.

2. The Director of the State Docks and Terminals is without authority to pay the Docks Personnel Officer compensation for personnel work performed by such officer for the Terminal Railway Division of the Department of State Docks and Terminals, in addition to his salary as fixed under the provisions of the Merit System Law.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of April 4, 1947, is as follows:

"The State Docks employs a Personnel Officer who works directly under the Director. His position is in the classified service of the State for which a pay range is provided.

"As you know, the Railway Terminal Division of this Department is not subject to the Merit System Law. Payrolls for employees who work in that Division are not checked by the Personnel Department, and in many ways it is a separate organization. It is my desire to have my Personnel Officer handle certain personnel work for this Division in addition to his duties specified in the description of his position with the Docks. Your official opinion is requested on the following matters:

"1. May I require this employee to assume duties and responsibilities not required of his position in the classified State service?

"2. If he performs these duties with the Railway Terminal Division in a satisfactory manner, may I compensate him on that payroll for duties performed, in addition to the salary he is paid on our Docks payroll as Docks Personnel Officer?"

The position of Docks Personnel Officer is a new position. A classification therefor, including a job specification describing the duties and responsibilities, has been established. It appears that this is in accord with the provisions of the Merit System Law. See Title 55, Sections 303, 299, and 297, Code of Alabama 1940, and Rule V of the State Personnel Board adopted pursuant to Title 55, Section 300, Code of Alabama 1940.

Your attention is called to the following provisions of the job specification:

"KIND OF WORK: Specialized administrative work involving responsibility for the selection, training, promotion, welfare, compensation, and discharge of employees, and other employer-employee relationships at the State Docks and Terminals; and related work as required.

"DISTINGUISHING FEATURES OF WORK: An employee in this position is responsible for all personnel functions of the State Docks and Terminals, subject to the policies and instructions of the Docks Director and to the State Merit System Act and Rules of the State Personnel Board. * * * * *

"EXAMPLES OF DUTIES: * * * * *

"Acts as liaison between the Docks and Terminals and the State Personnel Department;" (Emphasis supplied.)

It will be seen from the above provisions of the job specification:
(1) That the position of Docks Personnel Officer involves administrative

personnel work at the State Docks and Terminals and related work as required. (2) That the Docks Personnel Officer is responsible for all personnel functions of the State Docks and Terminals. (3) That such officer acts as liaison between the Docks and Terminals and the State Personnel Department. (4) That in the performance of his duties, he is subject to the policies and instructions of the Docks Director, the provisions of the Merit System Law, and the rules and regulations of the State Personnel Board.

It is clear from this job specification that the Docks Personnel Officer is responsible for all personnel functions of the Department of State Docks and Terminals, including the Railway Terminal Division.

A pay rate, with a minimum of \$300.00 per month and a maximum of \$375.00 per month, has been established for this position, and the entrance salary therefor has been fixed at the minimum. It appears that this is also in accord with the provisions of the Merit System Law. See Title 55, Sections 304, 299, and 297, Code of Alabama 1940, and Rule VI of the State Personnel Board adopted pursuant to the provisions of Title 55, Section 300, Code of Alabama 1940.

It is my opinion that since, under the job specification established for the position of Docks Personnel Officer, he must perform personnel functions for the Department of State Docks and Terminals, including the Railway Terminal Division thereof, and related work as required (by you or the State Personnel Board), and such job is subject to the provisions of the Merit System Law and the rules and regulations of the State Personnel Board, you would be without authority to pay such officer compensation for personnel work performed by him for the Terminal Railway Division of the Department of State Docks and Terminals, in addition to his salary fixed in accordance with the provisions of the Merit System Law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 2, 1947.

Hon. Winston Stewart,
Judge of Probate,
Coosa County,
Rockford, Alabama.

Counties—Municipalities—Title 37, Sections 308-340, Code of Alabama 1940.

1. Title 37, Sections 308-340, Code of Alabama 1940, author-

izes any county, city or incorporated town of the State to acquire or construct a waterworks system.

2. By virtue of Sections 308-340, supra, either the county or the town has authority to grant financial aid to the other out of monies in its general fund, not otherwise appropriated, to acquire or construct a waterworks system to serve both the county and the town.

3. It is a sufficient consideration for the grant that the citizens, as well as the public corporation making the grant, will reap the benefit derived from such waterworks system.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of April 16, 1947, is as follows:

"The Town of Rockford in Coosa County is without a water system. The County of Coosa owns certain facilities in this connection, namely, a small pump and a small tank. The Town of Rockford is badly in need of a water system, and Coosa County is badly in need of water facilities for its installations (court house, activity building, jail, etc.).

"The Town of Rockford and Coosa County propose to enter into the following arrangement to the end that a water system may be constructed for the purpose of serving the Town of Rockford and the County's installations mentioned above, located in the Town of Rockford.

"Coosa County has appropriated the sum of \$17,985 for the purpose of purchasing a well pump, tank, foundation for a tank, drain and pipe and cost of construction. The Town of Rockford proposes to issue revenue bonds and to use the proceeds for the purpose of completing a water system for the Town of Rockford. After the County has expended the \$17,985 for the purposes set out above, the County will turn over this installation to the Town of Rockford, and the Town will use these installations and equipment provided by the County in making its water system for the entire Town function. The Town proposes to reimburse the County in the following way:

"The Town proposes to furnish water to the County for its several buildings in the City and the County is to credit the Town on a monthly basis for the water furnished. In other words, the Town of Rockford proposes to pay Coosa County the \$17,985 by furnishing water to the County for its buildings each month. The

entire system, when completed, will be owned by the Town of Rockford. The Town of Rockford will owe, for the construction of the water system, the holders of the bonds and the County of Coosa.

"The County has adopted a resolution, which sets out the above arrangement.

"The question I desire to submit to you for answer is whether or not the arrangement mentioned above between the County and Town violates any statute of this State, or is a violation of any of the provisions of the State Constitution. Stated a little differently, do the County and the Town have authority in law to proceed to carry out the arrangement set out above? Are there any legal handicaps of any kind to such an arrangement between the Town and the County?"

Your letter and attached resolution of the Court of County Commissioners of Coosa County show a very definite need of the county, and also the Town of Rockford, for a waterworks system, and that the same will be of very substantial benefit to the county, the municipality, and the citizens therein.

It also clearly appears that the contract or arrangement set forth in the resolution is one between two subdivisions of the state government, and that the appropriation to be made by the county is out of funds available in the county treasury.

It appears from your letter and the resolution that neither the county nor the municipality is able to finance the construction of a waterworks system.

The legal question presented is: Have the governmental subdivisions authority to give financial aid one to the other for the purpose of acquiring or constructing a waterworks system for the benefit of both?

The Supreme Court of this State, in the case of *State ex rel. Austin v. City of Mobile* (Ms. December 12, 1946), 28 So. 2d. 177, (Advance Sheets), holds that such an arrangement is valid. In that case, the Board of Commissioners of the City of Mobile passed a resolution providing for the payment of \$350,000.00 to the Department of State Docks and Terminals of the State of Alabama. The resolution recited that the State had determined upon a program to expand the system of Alabama State Docks and Terminals in the City of Mobile; that this program would be a very substantial benefit to the city and its citizens generally. Finally, the resolution provided that in consideration of the recited facts, and of the great benefit which the city and its citizens would derive from the program, the city grant said sum of money to the State in payment and satisfaction of the commitments of the city made to the State as an inducement to develop the Port of Mobile.

The Court, speaking through Justice Stakely, cited and quoted from many Alabama cases, as well as cases of other states, and from the Su-

preme Court of the United States that held that the city had a right to grant funds in consideration of the recited benefits to be gained by the improvement.

The County of Coosa and the Town of Rockford have specific power and authority under Title 37, Sections 308-340, Code of Alabama 1940, to acquire by purchase, by construction, by condemnation, or by a combination thereof, a waterworks system, just as the City of Mobile had specific authority to construct sea walls, dikes, levees, etc.

In the Mobile case, *supra*, the city made a grant or donation in consideration of the benefits to be derived from the carrying out of the program. The question presetned by the County of Coosa and the Town of Rockford is on a much stronger footing. Here the Town of Rockford proposes to repay the money advanced by the county.

It is my opinion that the County of Coosa and the Town of Rockford have power and authority to enter into the agreement set forth in your letter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 7, 1947.

Hon. A. R. Meadows,
Superintendent,
State Department of Education,
CAPITOL.

City Superintendent of Schools—

Qualifications—Title 52, Sections 103, 155, 178, Code of Alabama 1940.

The provisions of Title 52, Sections 103 and 155, control and define the qualifications of a City Superintendent of Schools and the provisions of Title 52, Section 178, have no control whatsoever over the qualifications of City Superintendents of Schools.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of April 22, 1947, is as follows:

"Title 52, Code of Alabama 1940, Section 178 in stating the qualifications for city superintendent of schools specifies proof of 3

years of successful teaching experience; but Section 155 specifies that the city superintendent shall possess the same qualifications as that of the county superintendent of education; and Section 103, in stating the qualifications of the county superintendent, specifies 3 years of successful teaching experience in the last five years. Your opinion on the following question is requested:

"Do sections 155 and 103 control the qualifications of a city superintendent of schools with reference to teaching experience or does section 178 control such qualifications?"

In order to answer your questions as to whether or not Title 52, Sections 103 and 155, control the qualifications of city superintendent of schools, or whether the provisions of Title 52, Section 178 of the Code of Alabama 1940, control such qualifications, it is necessary to trace the legislative history of these three code sections.

Under the provision of an Act of the 1927 Legislature, the then existing school laws were codified and designated as the School Code of 1927. Section 103, *supra*, was designated in the 1927 School Code as Section 139, this section of the 1927 School Code having for its origin Act No. 575, General Acts 1923, Page 748.

Section 155, *supra*, has for its origin Section 195 of the School Code of 1927. Section 178, *supra*, has for its origin Section 220 of the School Code of 1927.

Section 139 of the School Code of 1927 provided that a county superintendent of education should have as one qualification proof of three years of successful teaching experience next preceding his appointment.

The provision of Section 220 of the School Code of 1927 having to do with the qualifications of city superintendent of schools likewise provided that such city superintendent should have as one of his qualifications proof of three years of successful teaching experience.

Section 195 of the School Code of 1927 appears in the 1940 Code as Title 52, Section 155, in identical language as that in the School Code of 1927.

This section provided in the former Code and also in the Code of 1940 that the superintendent of city schools must possess the same qualifications required of a county superintendent of education.

Act No. 575, passed in 1923, *supra*, was amended by Act No. 511, General Acts 1927, page 606, by requiring that one of the qualifications for a county superintendent of education was that he should give proof of three years of successful teaching experience during the five years next preceding his appointment. It will thus be noted that the qualifications

for county superintendent of education were changed by this amendatory Act of 1927. This Act was brought forward in identical language as Title 52, Section 103 of the Code of Alabama 1940.

The problem is, therefore, to resolve the irreconcilable conflict which now exists between Section 103 and Section 178 of Title 52 of the Code of 1940, the former section requiring that the county superintendent of education must prove three years of successful teaching experience during the five years next preceding his appointment, and on the other hand Section 178 providing that one of the qualifications for a city superintendent of schools is that he must prove three years of successful teaching experience, this conflict being brought about by the provisions of Section 155, *supra*, wherein it is provided that a city superintendent of schools must possess the same qualifications required by a county superintendent of education.

In 25 R. C. L., page 925, Section 175, it is said: "It has been held that where two inconsistent statutes are carried into the codified law, the one last passed, which is the latter declaration of the legislative will, should prevail." See *Adkins v. Arnold*, 235 U. S. 417, 35 S. Ct. 118; *Hillsboro County v. Jackson*, 58 Fla. 210, 50 So. 423.

The foregoing rule of construction is followed by our own courts of last resort. Where there is conflict, repugnancy or inconsistency between two provisions of law as they appear in the Code, the court will look to their history and origin and give effect to that provision which was last enacted by the Legislature as being the last expression of its will and intent. The latter enactment will prevail over the earlier one insofar as the earlier Act is in conflict with or inconsistent with the latter enactment. *Steele v. State*, 61 Ala. 213; *Gunter v. State*, 83 Ala. 96, 3 So. 600; *Zaner v. State*, 90 Ala. 651, 8 So. 698; *Calhoun Co. v. Watson*, 152 Ala. 554, 44 So. 702.

With the legislative history of these two sections in mind, and also taking into consideration the rule as laid down by our courts, it is my opinion that Title 55, Section 103 of the Code of Alabama 1940, controls the qualifications of city superintendents of schools, and Title 52, Section 178, has no control whatsoever over the qualifications of such superintendents. It might be said that Section 178, *supra*, has been repealed by the now existing terms of Section 103, *supra*.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 8, 1947.

Hon. J. L. Potts,
Sheriff,
County of Lauderdale,
Florence, Alabama.

Pistols—Concealed—Confiscation of—Title 14, Section 175,
Code of Alabama 1940.

1. Since Alabama statutes are silent on forfeiture and confiscation of concealed weapons, the pistol carried by a person convicted of violating Title 14, Section 175, Code of Alabama 1940, must be returned to him if he has committed no "crime of violence" as defined by Section 172.

2. Shooting into a dwelling house is not a "crime of violence" as defined by Section 172.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of April 9, 1947, is as follows:

"I have in my possession a pistol taken from the automobile of a person who had no license to carry the same. He has pleaded guilty and paid a fine for illegally carrying a pistol in a vehicle. This person has been convicted several times. The crimes for which he has been convicted include violating the Prohibition Law, driving while intoxicated and shooting into a dwelling house. So far as I can ascertain, he has not been convicted of a crime of violence as defined by Title 14, Section 172 of the Code.

"Under the facts above stated, what disposition shall be made of this pistol? Shall it be returned to the owner?"

Article 1, Section 26, Constitution of Alabama of 1901, provides:

"That every citizen has the right to bear arms in defense of himself and the state."

Amendment II, Constitution of the United States, provides:

"A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

Title 14, Section 175, Code of Alabama 1940, provides:

"No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of

business, without a license therefor as hereinafter provided."

This section is a part of the "Uniform Firearms Act," as contained in Sections 172-186 of the Code of 1940, Title 14, which Act was adopted by the State of Alabama in 1936.

Title 14, Section 177, Code of Alabama 1940, provides for the proper issuance by the sheriff of yearly permits to suitable persons upon good cause.

Statutes prohibiting the carrying of weapons concealed are mere regulations, and are not violative of the Constitution.

State v. Reid, (1840), 1 Ala. 612, 35 Am. Dec. 44.

Title 14, Section 174, Code of Alabama 1940, provides:

"No person who has been convicted in this state or elsewhere of a crime of violence, shall own a pistol or have one in his possession or under his control."

Title 14, Section 172, Code of Alabama 1940, defines "crime of violence" as:

"Murder, manslaughter, rape, mayhem, assault with intent to rob, assault with intent to ravish, assault with intent to murder, robbery, burglary, kidnapping, and larceny."

The Code of Alabama 1940, as amended, does not contain statutory authority for the forfeiture or confiscation of concealed weapons. In the absence of statutory authority, forfeiture and confiscation are not authorized.

City Council of Abbeville v. Leopard, (1901), 61 S. C. 99, 39 S. E. 248; *City of Chicago v. Holmes*, (1922), 226 Ill. App. 407; *People v. Carfano* (1923) 202 N. Y. S. 223, 207 App. 866; 68 *Corpus Juris* 71, Section 85.

The Attorney General has previously ruled that, since the Alabama statutes are silent on the question of forfeiture and confiscation, no such right on the part of the State exists.

See *Quarterly Report of Attorney General*, Volume 5, October-December 1936, page 70.

From your statement of the facts, it is noted that the individual concerned has committed no "crime of violence" as defined by Section 172, *supra*. It is therefore my opinion that you are, as Sheriff, at liberty to return the pistol to the owner without any formal procedure.

We are of the further opinion that, although this individual has been

convicted of "shooting into a dwelling house," which is made a misdemeanor under Title 14, Section 171, Code of Alabama 1940, such offense is not a "crime of violence" within the meaning of Section 172, same title.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

May 9, 1947.

Hon. C. E. DeLoach, Mayor,
City of Lanett,
Chambers County,
Lanett, Alabama.

Municipalities—Licenses—Insurance—Title 37, Sections 735
and 739, Code of Alabama 1940—

A foreign fire or marine insurance company not qualified under the law of the State to write insurance and having no established place of business in a municipality or resident agent in Alabama is not engaging in, carrying on, or doing business in such municipality, where the policy is issued by, and the premium is paid directly to, the home office of the fire or marine insurance company in another state, such policy covering property located within the corporate limits of the municipality, and is not subject to a license levied against such companies by a municipality as provided in Title 37, Sections 735 and 739, Code of Alabama 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 14, 1947, is as follows:

"In compliance with a former resolution of the City of Lanett, Alabama, I am directed and do hereby request from you an opinion on the following question:

"The City of Lanett has adopted an ordinance levying a license or privilege tax on fire and marine insurance companies as provided by Title 37, Paragraph 739 of the Code of Alabama of 1940.

"Would a fire or marine company having no established place of business in the City of Lanett, or resident agent in Alabama, be subject to the payment of the license imposed by the City of Lanett where the policy is issued by and where the premium paid direct to

the home office located in another state such policy covering risk on property located within the corporate limits of the City of Lanett?"

In answering your inquiry, it is assumed that the foreign fire or marine insurance company under consideration has not qualified under the laws of this State to write insurance. Due to the wide scope of the question under consideration, this opinion must be closely confined to the facts set out in your inquiry and should not be applied in considering the liability of a foreign fire or marine insurance company for the license tax under consideration when other facts are involved than are set out in your inquiry.

Title 37, Section 735, Code of Alabama 1940, provides in part as follows:

"§ 735. Licenses to business, trade, profession, etc.—All municipalities shall have the power to license any exhibition, trade, business, vocation, occupation, or profession not prohibited by the constitution or laws of the state, which may be engaged in or carried on in the city or town; to fix the amount of licenses, the time for which they are to run not exceeding one year, and provide a penalty for doing business without a license, and to charge a fee of not exceeding fifty cents for issuing each license; * * *" (Emphasis supplied.)

Title 37, Section 739, Code of Alabama 1940, which section deals specifically with the license or privilege tax on fire or marine insurance companies, is in part as follows:

"§ 739. Fire and marine insurance companies.—No license or privilege tax or other charge for the privilege of doing business shall be imposed by any municipal corporation upon any fire or marine insurance company doing business in such municipality, except upon a percentage of each one hundred dollars of gross premiums, less return premiums, on policies issued during the preceding year on property located in such municipality. Such percentage shall not exceed four percent on each one hundred dollars or major fraction thereof, of such gross premiums; and no credit or deduction of any kind shall be allowed or made on account of the cost of reinsurance by such company in a company not authorized to do business in this state. * * *" (Emphasis supplied.)

It will be seen from Sections 735 and 739, supra, that the license tax under consideration may be levied for engaging in, carrying on, or doing business in a municipality by a fire and marine insurance company. Therefore, to answer your inquiry, it must be determined whether the foreign fire or marine insurance company is engaging in, carrying on, or doing business in the municipality levying the license.

The following statement is found in 137 A. L. R. 1130:

"It is impossible, in view of the dependence of the question upon the facts of each case, to state categorically a general rule as to what constitutes doing business in a state by a foreign insurance corporation. It is clear that in determining the question, the activities and situation must be judge as a whole, and the fact that none of the several acts or transactions considered separately constitute doing business is not necessarily conclusive that a combination of such acts or transactions also will not constitute doing business. The decision as to what constitutes doing business may be influenced to a large extent by the nature and objects of the statute under construction or the issue involved in the particular case, * * * * * Singly, and in combination, various acts and transactions of foreign insurance corporations have been held to constitute, or not to constitute, doing business in the state. * * *"

In the case of *Sasnett v. Iowa State Traveling Men's Association*, 90 Fed. (2d), 514, the court said:

"The Supreme Court, so far as we are advised, has not formulated any hard and fast rule as to what constitutes 'doing business' by a foreign corporation within a state * *; but has decided each case that has come before it involving that question upon the facts therein disclosed."

It will be seen from the above authorities that the question of whether or not an insurance company is doing business in a state is largely influenced by the statute and facts under consideration in a particular case.

In dealing with the question of whether or not an insurance company is doing business in a state, Couch on "Insurance" (1929 Edition), Volume 1, Section 245(b), page 566, states:

"Considering this question, it has been declared that although no all embracing rule has been, or can be, laid down, by which it may be determined what constitutes the doing of an insurance business in a state, it may be said that the business must be of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which, for instance, it is served, and in which it is bound to appear when a proper agent has been served with process. And clearly the subject is one which lends itself only to a detailed treatment of the cases. First, taking up those cases in which it has been determined that the respective activities in question did not constitute doing an insurance business in the state, we find, naturally, that 'doing an insurance business' signifies only the ordinary business of insurance proper, to the exclusion of incidental business, or the performance of preliminary conditions, such as the sale of stock, or the appointment of agents, or even preliminary negotiations for insurance by telegraph or mail. Thus, taking an application for a

policy, and forwarding it to the home office of the company in another state, is not doing insurance business, nor is insuring property in one state, where the application is received at, and the policy is issued from, the home office in another state. And issuing a policy by a corporation of one state on property in another state does not constitute carrying on business in the latter state. So, a New York corporation procuring insurance in New York on Arkansas property, without complying with the laws of the latter state, is not 'doing business' in Arkansas so as to invalidate the contract in that state. Nor is it 'doing business' in one state where the contract is applied for and consummated through the mail in another state. * * * *

In 137 A. L. R. page 1131, it is stated:

"Thus, in *Hazeltine v. Mississippi Valley F. Ins. Co.* (1893; CC) 55F 743, it was held that a foreign insurance company was not doing business in the State of Maine so as to permit substituted service upon it where the only proof was that the property insured was located in that state, wherein the insured resided. The court said: 'But the plaintiff here contends that "the very act of insuring property situated in the state of Maine is of necessity 'doing business in the state;" and he necessarily concedes that the defendant company did not have "an office or agent in the state." There is no proof here that the company ever issued other fire policies covering property in that state, and the question simply is whether the insurance, by correspondence, or property in a state belonging to a resident therein by a foreign insurance company is carrying on or doing business in such state. If A., a resident of Maine, should, while at Memphis, personally procure insurance on his property there, in a Memphis company, and immediately pay the premium, could it be insisted that the transaction was a Maine one? Or if the owner of a ship or cargo at sea, or in a foreign port, should himself, at Memphis, so effect insurance thereon in such company, would it be contended that the transaction was other than a contract made in Tennessee, or that the business was done elsewhere than in this state? Or, in the case first put, would the fact that the business was negotiated by correspondence make it any less business done here? * * *

"So too in *Ivy River Land & Timber Co. v. National F. & M. Ins. Co.* (1926) 192 NC 115, 133 SW 424, it was held that a foreign insurance corporation was not doing business in North Carolina so as to permit service of a summons in an action against it upon the secretary of state, where it appeared that the company, a resident of New Jersey, has issued three policies to residents of North Carolina upon property located in the latter state, is not appearing that the policies were issued in North Carolina or through an agent or another person in that state, the court saying: 'It cannot be held that the issuance of one or more policies of fire insurance by a corporation created and existing under the laws of another state, and not

authorized to do business in this state, insuring citizens of this state against loss or damage by fire to property situate in this state, the contracts for such policies having been made and the premiums having been paid in the state in which the foreign corporation has its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this state, constitutes "doing business" in the State of North Carolina within the meaning of these words (the statute providing for service of process on the secretary of state).' * * * * *

In the case of *Huntington v. Sheehan*, 206 N. Y. 486, 100 S. E. 41, the court held that where defendants in New York had a letter addressed to a Massachusetts insurance company requesting a renewal fire insurance policy, and that company accepted their proposal in Massachusetts and mailed them the policy, the transaction was a Massachusetts contract and did not constitute doing business in New York.

In the *Sasnett case*, *supra*, the court held that an Iowa insurance association which maintained no office outside of Iowa, had no soliciting agents, and issued certificates and paid losses from its home office in Iowa was not doing business in the District of Columbia so as to permit a District of Columbia beneficiary suing on certificates to obtain service of process on a physician employed by the association in the District of Columbia to make medical examinations. In this case the court said:

"The cases appear to hold that merely casual acts do not constitute 'doing business'; that there must be some continuity in the employment of an alleged agent, or at least that the employment existed at the time of the alleged service; that the mere insuring of residents of a foreign state, the contract of insurance being made and being carried out in the home state of the association, does not constitute, 'doing business' in the state of the insured."

In view of the above authorities, it is my conclusion that a foreign fire or marine insurance company having no established place of business in the City of Lanett or resident agent in Alabama is not engaging in, carrying on, or doing business in the City of Lanett, where the policy is issued by and the premium is paid directly to the home office of the fire or marine insurance company in another state, such policy covering property located within the corporate limits of the City of Lanett.

It therefore follows that your inquiry must be answered in the negative.

I again wish to call your attention to the fact that this opinion is not applicable to a situation in which a fire or marine insurance company does such acts in Alabama as examining the risks covered by the policy or adjusting losses occurring thereunder.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 13, 1947.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Counties—Courts of County Commissioners—Health and Health Department—Title 22, Section 14(12), Code of Alabama 1940.

Under the provisions of Title 22, Section 14(12), Code of Alabama 1940, the governing body of the county may legally appropriate funds to the cancer control program, if such program has been recommended by the county health officer, endorsed by the county board of health, and approved by the county governing body.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of April 30, 1947, is as follows:

"There is what they call a cancer cure, treatment, preventative or research program being carried on over the state and those in charge of the campaign have county quotas in which counties, as such, are assessed certain amounts, to be paid out of county funds.

"Lamar County's quota is \$331.00. This is in addition, as it is submitted, to the sums and amount donated by individuals, and is to be paid out of the county treasury.

"Please advise if we are authorized and if it would be a legal expenditure of county funds for us to pay this sum out of the county general fund for this purpose."

In answer to your inquiry, your attention is called to Title 22, Section 14(12), Code of Alabama 1940, which section is in part as follows:

" * * * the court of county commissioners, or other like board, * * * may in its discretion appropriate, from the revenues of the county, money for the prosecution of public health work which has been recommended by the county health officer and indorsed by the county board of health and approved by said court of county commissioners, or other like board."

Under the above statute counties are authorized but not required to appropriate funds for health work. Quarterly Report of Attorney General, Volume 36, page 80.

The term "from the revenues of the county" means from the general fund of the county. *Weaver v. Tidwell*, 228 Ala. 169, 153 So. 218; Biennial Report of Attorney General, 1936-38, page 682.

It is my opinion that under the provisions of the above statute, the governing body of Lamar County may legally appropriate \$331.00 to the cancer control program, if such program has been recommended by the county health officer, endorsed by the county board of health, and approved by the county governing body. Such appropriation may be paid from the general fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 13, 1947.

Hon. Lawrence A. May,
First Assistant,
State Service Commissioner,
Department of Veterans' Affairs,
P. O. Box 1509,
Montgomery 2, Alabama.

Title 37, Section 455, Code of Alabama 1940. Leg Amputee Veterans—Special parking privileges.

Municipalities may pass ordinances or adopt resolutions granting leg amputee veterans of World War I and World War II special parking privileges.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion under date of April 16, 1947, is as follows:

"Will you kindly furnish this office an official opinion as to whether or not the City Commission of Birmingham, or any other municipality of Alabama, can legally pass an ordinance or adopt a resolution granting to leg amputee veterans of World War I and World War II special automobile parking privileges. Such privileges would permit the amputee veteran to park over-time, or for a longer period than provided for the general public, the reason being obvious."

My answer is in the affirmative.

It is my opinion that the passage of laws granting leg amputee veterans of World War I and World War II special automobile parking

privileges clearly falls within the sovereignty of the State as a matter of police power. Numerous cases have held that the State may delegate designated police powers to its municipalities inasmuch as municipalities are merely bodies politic created by the State. Further, municipal ordinances are deemed to have the effect of law when sufficient authority is vested in the municipality to enact ordinances on varied subjects and said ordinances are not otherwise inconsistent with State law. 11 *American Jurisprudence*, Constitutional Law, Sections 223 and 256.

Title 37, Section 455, Code of Alabama 1940, reads as follows:

"§ 455. Power to adopt and enforce ordinances.—Municipal corporations may, from time to time, adopt ordinances and resolutions not inconsistent with the laws of the State, to carry into effect or discharge the powers and duties conferred by this title, and provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and conveniences of the inhabitants of the municipality, and enforce obedience to such ordinances by fine not exceeding one hundred dollars, and by imprisonment or hard labor not exceeding six months, one or both."

The legal foundation for such a local ordinance referred to therefore appears clear. The fact that amputee veterans are allowed to park their automobiles in parking spaces for longer periods of time than the general public is in my opinion a reasonable discretionary exercise of the police power of the municipality. Numerous cases of our Supreme Court have held laws and ordinances of analogous import not to contravene any provisions of our State Constitution; the Federal Constitution has been similarly construed by the U. S. Supreme Court. Where it is actually for the benefit of society the State may, without violating any constitutional provisions, enact such reasonable class legislation as is required.

Numerous instances exist wherein our State Legislature has conferred class privilege. A few examples are: those laws exempting veterans from payment of poll tax; exempting veterans from payment of business licenses under certain conditions; and exempting deaf mutes, insane or blind persons from ad valorem taxation up to two thousand dollars—all class discriminations. The criteria appears to be the reasonableness of the class discrimination and the benefit to society. Certainly the proposition of classifying leg amputee veterans from the general driving public in the matter of parking privileges is a reasonable classification.

Inasmuch as the legal foundation for adopting an ordinance such as you refer to appears well supported both from the standpoint of being a legitimate exercise of municipal police power and a reasonable classification under our State and Federal Constitutions, you are herewith advised that the City of Birmingham or any other municipality of Ala-

bama can legally pass an ordinance or adopt a resolution granting leg amputee veterans of World War I and World War II special parking privileges.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1947.

Hon. Allan W. Lee,
Tax Collector,
Hon. Bovel Summers,
Tax Assessor,
Etowah County,
Gadsden, Alabama.

Act No. 135, Local Acts 1943, page 69. Act No. 136, Local Acts 1943, page 71.

1. Act No. 135, Local Acts 1943, page 69 changing system of remuneration of county tax collector of Etowah County from fee to salary basis held not to violate Amendment XLIII of the Constitution of Alabama 1901, or any other constitutional provision.

2. Act No. 136, Local Acts 1943, page 71, changing system of remuneration of county tax assessor Etowah County from fee to salary basis held not to violate Amendment XLIII, Constitution of Alabama 1901, or any other Constitutional provision.

Opinion by Assistant Attorney General Gallion.

Dear Sirs:

Reference is made to your request, dated March 24, 1947 which is as follows:

"The Legislature of Alabama in its 1943 session enacted two local statutes placing the tax collector and the tax assessor of Etowah County, Alabama, on a salary basis in lieu of the fee basis under which we had been operating, which Acts were to go into effect on October 1, 1947. During this same session the Legislature enacted general laws (Acts Nos. 113-114, General Acts of Alabama 1943, page 115) which extended the terms of tax assessors and tax collectors to a period of six years.

"In view of these latter statutes we will appreciate your advising us as to whether the local acts enacted at the same session of the

Legislature are in violation of Section 281 of the Constitution of Alabama or any other constitutional provision.

"In the event you hold the local acts placing us on a salary basis as of October 1, 1947, are unconstitutional we will appreciate your advising us whether the provisions of said acts are complete nullity or whether they will become effective at a future date."

Laws that are pertinent to the questions you have presented are as follows:

Act No. 113 and Act No. 114 (General Acts of 1943, page 115), approved by the Governor on June 8, 1943. These companion Acts extend the terms of the tax assessors and tax collectors of the State of Alabama for a period of two years and makes their terms six years instead of four years. These Acts applied to terms beginning October 1, 1943, and thereafter.

Constitutional Amendment XLIII, proposed by Acts of 1939, page 1034, submitted to the voters November 5, 1940, and proclaimed ratified November 15, 1940. Proclamation Record, Vol. F. pp. 73, 74. This Amendment reads as follows:

"The Legislature of Alabama may hereafter, from time to time by general or local laws, fix, regulate and alter the fees, commissions, allowances and salaries, including the method or basis of their compensation, to be charged or received by the tax assessors, tax collectors, probate judges, circuit clerks, sheriffs, and registers of the equity courts, and including the right to place any one or all of said officers on a salary and provide for the fees charged and collected by said officers to be paid into the treasury from which their salaries are paid, and provide the method and basis of their compensation, provided the salary, fee or compensation of any officer named herein shall not be increased or diminished during the term for which he shall have been elected or appointed, after his election or appointment, in the following named counties: Etowah and Cherokee."

Local Acts 135 and 136, applicable to Etowah County, Acts of 1943, pp. 69 and 71. These two Acts are the enabling provisions of Amendment XLIII, supra, and were both approved on June 10, 1943. The effect of these two Acts is to put the assessor and collector of Etowah County on a salary basis in lieu of the fee system.

It is to be noted that both the General Acts and the Local Acts aforementioned were all passed and approved after you were elected to office at the general election in 1942 for the term beginning October 1, 1943. Except for the extension granted by the two General Acts your terms to which you were elected would expire on October 1, 1947. By virtue of these two bills your terms now expire on October 1, 1949. The two Local Acts seek to effect a change in your remuneration beginning

on October 1, 1947—not during the term for which you were elected, but beginning with the extension.

One of the questions you present is whether or not the two Local Acts purporting to effect a change in your remuneration violate any provision of the Constitution which prohibits such change, with special reference to Section 281 of the Constitution, which provides as follows:

“§ 281. The salary, fees, or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed.”

I wish to call attention to the provision in Amendment XLIII of similar import as follows:

“* * * * * provided the salary, fees or compensation of any officer named herein shall not be increased or diminished during the term for which he shall have been elected or appointed, after his election or appointment, in the following named counties: Etowah and Cherokee.” (Emphasis supplied.)

These underscored words appearing in the foregoing Amendment supplement any implication contained in Section 281 of the Constitution that such change of remuneration could not be lawfully made after you were elected or appointed and before the beginning of your terms. This supplement, in my opinion, prohibits any change in the plan of your remuneration by law passed and approved after your election in November, 1942, but before you took office in October, 1943, with respect to the terms for which you were elected in November, 1942.

But these Constitutional restrictions do not, in my judgment, have any application to the extended term provided by General Acts 113 and 114, for the reason, if no other, that you were neither elected nor appointed to the extended term prior to June 10, 1943, at which time these two Acts were approved by the Governor and became law.

The Supreme Court of Alabama, in the case of Walker County v. Barnett, 24 So. 2nd. 665, in an opinion by Justice Livingston, in construing the effect of a law passed in 1945, after the term of the officers began in October, 1943, sustained the constitutionality of these two Acts extending the terms of the terms of the assessors and collectors. The crux of the decision, so far as it pertains to the constitutionality of these two Acts under consideration, appears in Sections 2 and 3, which read as follows:

“2. The legislative power of the State is absolute with respect to all offices that it creates, where no constitutional restriction is placed upon its power with reference thereto, and the legislature

may lengthen the term of such offices as it sees fit. See cases cited in Notes, 97 A. L. R. 1436, subdivision 111.

"3. We find nothing in the Constitution of this State denying or limiting the power of the legislature to appoint officers to fill the office of tax collector, an office created by the legislature. And it was said in the case of Dorlon v. Blan, State Auditor, 22 Ala. App. 622, 118 So. 682, 683, in respect to the two year extension of the term of the tax collector provided by the 1923 act, above referred to, 'In the instant case relator (tax collector) was serving a term created by the Legislature and by virtue of legislative appointment for that term.'"

We may conclude that the Supreme Court definitely determined the authority of the Legislature to name the officers to offices of statutory creation. By similar token this decision definitely upheld the right of the Legislature to name you as the officers for the extended term, which, together with the regular term, was of statutory creation. It is true that the Legislature did not spell out the name of the appointee, but the effect was to name the holder of the office as the appointee. It is not necessary hereto to determine whether the holder on October 1, 1943, when the new elective term began, or such holder on October 1, 1947 when the extended terms begin, is the appointee. Suffice it is to say that the holder on October 1, 1947, will for all practical purposes be the legislative appointee.

Whether the effective date of your appointment was the date you took office for your elected term, namely, October 1, 1943, or is October 1, 1947, is not necessary to decide. These two Acts granting the extension were prospective in operation to fill the extension. Your appointments by the Legislature being prospective as to either of these two dates, you can have no just complaint that your remuneration has been changed by Acts passed after you were elected and before you took office. The extensions were legislative gratuities to you and to which you were neither elected nor appointed prior to June 10, 1943. The salary change pursuant to the Local Acts will not take effect until October 1, 1947, when the gratuitous terms begin. The gratuity comes to each of you cum onere.

Therefore, I conclude that Local Acts 135 and 136, do not infringe upon any provision of the Constitution prohibiting any change in salaries, fees or compensation of your office for the extended term beginning October 1, 1947, or thereafter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1947.

Hon. Walter B. Jones,
State Geologist,
University, Alabama.

GEOLOGICAL SURVEY

U. S. C. A. TITLE 43, SECTIONS 31-46, CHAPTER 6, TITLE
55, SECTIONS 245-254, CODE OF ALABAMA.

STATE AND FEDERAL COOPERATION

1. The Federal and State Governments are authorized to cooperate in the execution of a geological survey of the lands and waters of the State of Alabama.

2. It is the intent of the Federal and State enactments to preserve and develop the natural resources of the State, and the law authorizing financial cooperation does not require that each government appropriate equal sums of money.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of May 5, 1947, is as follows:

"For many years the Geological Survey of Alabama has been carrying on a cooperative program with the U. S. Geological Survey in stream gauge work here in Alabama. Heretofore the plan has been carried through on a fifty-fifty basis.

"Officials of the U. S. Geological Survey, Washington, have advised that their funds available for cooperative work lack nine per cent in meeting allotments of the several states, including Alabama.

"The Legislature of Alabama has appropriated \$7,500.00 for the cooperative program. The money can be spent for nothing else.

"I am asking Colonel D. H. Barber, Supervising Engineer, District Office, Montgomery, Alabama, to deliver this letter to you, together with a copy of the cooperative agreement between our agencies.

"Specifically, we ask your opinion as to whether or not we can allot all of our money, even though it is not matched in full by the federal government.

"I might add that we greatly desire to spend our money for the purposes for which it was appropriated, if we can legally do so."

Title 43, U. S. C. A., Section 39, authorizes the President of the United States to have made a general utility topographical survey of the territory of the United States, including adequate horizontal and vertical control and the securing of such topographic and hydrographic data as may be required for this purpose and the carrying out of the enactment which empowers the President to utilize the services and facilities of the government.

Section 40 of this same title provides the agencies which may engage in carrying out the project and authorizes such agencies to enter into cooperative agreements with and receive funds made available by any state or civil subdivision for the purpose of expediting and carrying on the project or projects within the State's boundaries.

It very clearly appears from these provisions that the intent of the Congress was to make it the duty of the government to perform all these duties and secondary to open the door to the states to aid, if they desire to do so.

Section 40 of this federal law provides for the carrying out of the provisions of said Section 39 by authorizing the federal agency to enter into cooperative agreements with and to receive funds made available by the state in the execution of the plan.

The State of Alabama has seen fit to authorize the entering into this cooperative arrangement in Title 55, Sections 252 and 253, of the Code of Alabama. In this latter section it is specifically provided that the expenses "shall be borne by the State of Alabama and by the Federal Government in such proportion as is equitable." (Emphasis supplied.)

It clearly appears that neither the federal nor state law says anything about bearing the expenses of the work equally. So far as the federal statute is concerned, the government carries on the project and accepts whatever funds are made available by the states. The state cooperates and pays such amount of the expense as is equitable to both governments. Under the laws of the two governments unequal sums may be agreed upon.

In this State, Act No. 367, Acts 1911, pages 407-409, is the progenitor of cooperation and the basis of equality of the expenses. This Act, in Section 3, provides that the State shall pay one-half of the expense and the United States Geological Survey shall pay the other half. Later this sharing of the expenses equally was abandoned by the State of Alabama. In Act No. 511, Acts 1923, page 682, in Section 2, it is provided that the State Geologist may enter into an agreement with the Director of the United States Geological Survey whereby the expenses "shall be borne by the State of Alabama and by the Federal Government in such proportion as is equitable to both governments." These quoted provisions are brought literally into Section 253, Title 55, of the present Code of Alabama.

It becomes convincingly clear that the legislature intended to abandon the equality theory in the payment of expenses for such undertakings. Under both the federal and state laws either government has a right without the aid of the other to carry on these geological surveys. It follows that the State may use whatever funds have been appropriated for the work and receive as aid from the Federal Government whatever financial aid is made available by the United States. It appears from the General Appropriation Bill of 1945 on page 171 of the General Acts of 1945 that the legislature has appropriated \$7,500.00 for this purpose, and it is my opinion that this full amount may be used by the Geological Survey of Alabama without taking into consideration the amount of funds contributed by the Federal Government.

Respectfully yours,

A. A. CARMICHAEL,
Attorney General.

May 16, 1947.

Hon. J. H. Blount,
Tax Collector,
Washington County,
Chatom, Alabama.

Taxation—Assessment and payment of ad valorem taxes upon real property, without excepting mineral leases therefrom, by the owner of the surface rights only, satisfies the claim of the State for taxes on such mineral leases.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of April 14, 1947, is as follows:

"This is the first year we have collected tax on Mine leases, they were never assessed before. In making up my tax list for advertising I run into this situation.

"Mr. A. assesses and pays tax on a 40 acre tract of land, does not make any exceptions as to a lease or to mineral rights in any form, another party assesses a mineral lease on the same 40 acres or assesses mineral royalties on the 40 a mentioned, and fails to pay the tax, can I sell the mineral claims on the land?

"Looks to me that it is a double assessment, however I want to be sure."

In my opinion you are not authorized to proceed toward a sale of

the mineral rights or leases on the land because of the failure of the party assessing separately such mineral rights to pay the taxes shown by such assessment to be due.

The owner of the surface rights has assessed and paid taxes on the mineral rights and thereby discharged the claim of the State for the taxes due thereon.

Oil leases should be separately assessed by the owner thereof. Section 21, Title 51, Code of Alabama 1940, Report of Attorney General, October 1, 1940-December 31, 1940, page 159. However, the tax assessor is required to receive returns from any person of any property for taxation and to assess the same for taxation. Report of Attorney General, January 1, 1941-March 31, 1941, page 44, and authorities cited therein. And "it is a principle of taxation that, where the state has once proceeded by its duly constituted agencies to the assessment and valuation of property, the determination is judicial in its nature, and conclusive in its result, unless impeached for fraud or want of jurisdiction."

State v. Mortgage Bond Co. of New York, 224 Ala. 406, 140 So. 365;

Anniston City Land Co. v. State, 185 Ala. 482, 64 So. 110;

State v. Doster-Northington Drug Co., 196 Ala. 447, 71, So. 427.

The assessment of the fee includes all interests in and on the land. **State v. Mortgage Bond Co. of New York**, supra; Section 47, Title 51, Code of Alabama 1940.

The payment of taxes due upon an assessment of the fee satisfies the claim of the State for taxes upon the oil leases, which are included in the assessment of the fee.

In order for the Probate Court to be authorized to sell property for delinquent taxes it is necessary that the tax assessor "shall report to the court that he was unable to collect the taxes assessed against such land, or any mineral timber, or water right or special right, or easement therein * * * ." Section 249, Title 51, Code of Alabama 1940. The tax collector cannot so report if the property has been assessed and the tax thereon has been paid.

The remedy of the State is to assess property at its fair and reasonable market value. If the fee is returned for assessment, the authorities of the State should set a value upon it that includes all of its elements. Having fixed or approved the value upon the property and accepted the payment of the taxes thereon, the State cannot maintain that the taxes are unpaid. As it is stated by the court in the case of **State v. Mortgage Bond Co. of New York**, supra, "the public good requires security of titles as well as just taxation, and the law aims at both."

It was held in the case of **Payne County ex rel v. Empire Petroleum**

Co., et al, 104 Okla. 42, 230 Pac. 710, that the assessment of property by one who is not the owner thereof, and his payment of the taxes due under such assessment prevent the assessment of such property to the owner as an escape.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 21, 1947.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Licenses—Stores—Veterans—Exemptions—

Veteran's exemptions granted under Title 51, Article 14 (Sections 852-864) Code of Alabama 1940, as amended by Act #564, General Acts 1943, page 562, approved July 10, 1943, and Act #366, General Acts 1945, page 589, approved July 9, 1945, and under Act #353, General Acts 1945, page 570, approved July 6, 1945, are applicable to store license provided for in Title 51, Article 3 (620-629), Code of Alabama 1940, as amended by Act #430, General Acts 1945, page 675, approved July 6, 1945.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of April 21, 1947, is as follows:

"Will you please give me your opinion whether or not veterans are entitled to the exemption under section 864 Title 51 Code of Alabama, 1940, to be applied to the purchase of a store license levied under Section 720 same title.

"I am informed by the Probate Judge of Lamar County that the auditors have taken exception to the exemption in his county. Please give this matter your usual prompt attention. If you have ruled in the matter before, I have failed to find same."

In answer to your inquiry it is my opinion that the veteran's exemptions in regard to occupational and business licenses granted under the provisions of Title 51, Article 14, (Sections 852-864), Code of Alabama 1940, as amended by Act #564, General Acts 1943, page 562, approved July 10, 1943 and Act #366, General Acts 1945, page 589, approved July 9, 1945, (Title 51, Sections 852, 853, 854, 855 and 864, 1945 Cumulative

Pocket Part, Code of Alabama 1940), and under the provisions of Act #353, General Acts 1945, page 570, approved July 6, 1945 (Title 51, Sections 864(1)-(8), 1945, Cumulative Pocket Part, Code of Alabama 1940) are applicable to the store license provided for in Title 51, Article 3, (Sections 620-629, 1945 Cumulative Pocket Part, Code of Alabama 1940).

Both of the veteran's exemption laws, above referred to, allow veterans (who come within the purview thereof) certain exemptions in regard to the payment of business or occupational license taxes. The store license provided for in Title 51, Article 3, (Sections 620-629), Code of Alabama 1940, as amended, *supra*, in my judgment, is a business or occupational license tax within the meaning of these veterans' exemption laws. This license is levied on the privilege of opening, establishing, operating or maintaining stores or mercantile establishments, which necessitates the personal attention and efforts of the owner or operator thereof. The fact that the amount of the license is based on the number of stores or mercantile establishments involved is of no import.—Cf. Opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, under date of March 25, 1947.

For a full discussion of the application of the veterans' exemption laws in general, your attention is invited to Quarterly Report of Attorney General, Volume 40, page 50.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 21, 1947.

Mrs. Grace Ward,
Clerk of Circuit Court,
Bibb County,
Centreville, Alabama.

Crimes and Offenses—Rules of the roads—Accidents—Leaving scene of—Title 11, Section 81, Code of Alabama 1940, Act #427, General Acts 1945, page 670.

1. Title 11, Section 81, Code of Alabama 1940, which section exempts persons who plead guilty in county courts or courts of like jurisdiction and no appeal is taken from certain costs, has no application to Act #427, General Acts 1945, page 670.

2. The punishment fixed for the violation of Act #427, General Acts 1945, page 670, denotes such crime as a felony even though a violator thereof may be punished by a fine as in a misdemeanor case.

3. County courts and courts of like jurisdiction do not have jurisdiction to try or accept pleas of guilty from persons charged with the violation of Act #427, General Acts 1945, page 670.

Opinion by Assistant Attorney General McQueen.

Dear Madam:

Your request for an official opinion bearing date of April 17, 1947, is as follows:

"Bliss Hill was charged with the offense commonly called, Leaving the Scene of an Accident. The case was before the County Court of Bibb County, Alabama. When the case was called for trial the defendant entered a plea of guilty of such offense and was fined \$100.00 and the costs. A question has arisen in my mind as to the costs in this case. I call your attention to Section 81 of Title 11, 1940 Code which provides as follows: (In all misdemeanor cases for violation of any of the provisions of Titles 23 and 36 cognizable in justice of the peace courts, courts created in lieu of justice of the peace courts, county courts, inferior courts, law and equity courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases. (1939, p. 229). You will notice that the last part of the section provides that, 'where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in such courts for trial, solicitor's fees, or entering judgment in such cases.' No appeal was taken in this case. I will appreciate your opinion in answer to the following questions:

"1. Does Section 81 of Title 11 of 1940 Code apply to the offense of Leaving The Scene of An Accident when tried in the County Court of this county since the courts have held the offense to be a felony, but the punishment may be imposed as for a misdemeanor or a felony?

"2. Since the Section provides that on a plea of guilty no fee shall be taxed or collected in said courts for trial, I desire your opinion as to what costs is involved in that expression? Does that refer to the Trial Tax ordinarily imposed in misdemeanor cases or does it refer to the 50c trial fee the clerk receives?

"3. Should the Clerk tax the Solicitors Fee in such a case against the defendant since such case carries a \$30.00 solicitor's fee, which is the fee chargeable as if the case was a felony although the same was tried in a misdemeanor court?

"I will appreciate your opinion at your earliest convenience since the taxing of costs in this case is already pending."

The defendant mentioned in your request is charged with the violation of Act #427, General Acts 1945, page 670. Sections 1, 2 and 3 of this Act read as follows:

"Section 1. That the driver of any vehicle involved in an accident resulting in injury to or death of any person, or damage to a vehicle, shall immediately stop such vehicle at the scene of such accident, and shall also give his name and address, and the registration license number of his vehicle, and shall render to any person injured in such accident reasonable assistance, including the carrying of such injured person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary.

"Section 2. That every person convicted of violating this act, or any of the provisions thereof, shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment in the county or municipal jail or hard labor for the county for not less than thirty days nor more than one year or by imprisonment in the penitentiary for not less than one nor more than five years, or by both such fine and hard labor or imprisonment.

"Section 3. That the court shall revoke the driver's license of any person convicted of violating this Act or any of the provisions thereof."

The Court of Appeals of this State in the case of *State v. Hall*, 24 Ala. App. 336, 134 So. 898, had occasion to consider an act of the Legislature of 1927, which said act also made it a criminal offense to leave the scene of an accident without stopping and giving all assistance necessary to any injured person. Section 76, Subsections (a), (b) and (c), of 1927 Act read as follows (Now Title 36, Section 31, Code of Alabama 1940):

"(a) The driver of any vehicle involved in an accident resulting in injury or death to any person or resulting in the damage to property, shall immediately stop such vehicle at the scene of such accident.

"(b) The driver of any vehicle involved in an accident resulting in injury or death to any person or damage to property shall also give his name and address, and the registration license number of his vehicle and shall render to any person injured in such accident reasonable assistance, including the carrying of such person injured to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by such injured person.

"(c) Every person convicted of violating this section relative to the duty to stop in the event of accidents shall be punished by imprisonment in the county or municipal jail for not less than thirty days nor more than one year or in the state prison for not less than one nor more than five years or by fine of not less than one hundred

dollars nor more than five thousand dollars or by both such fine and imprisonment. The court shall revoke the permit or license of the person so convicted."

It is to be noted that the provisions of Act #427, supra, are almost identical with the provisions of the 1927 Act.

The court in the Hall case, supra, had this to say about the 1927 Act:

"(3) Under our statute, Code 1923, § 3874, a felony is defined as being a public offense which may be punished by death or by imprisonment in the penitentiary. Where an offense is not designated by the statute which creates it, either as a felony or a misdemeanor, but its punishment is prescribed, then the grade of such offense is determined by the punishment. *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *State v. Hicks*, 113 La. 845, 37 So. 776.

"(4) The maximum punishment fixed by this statute is five years in state prison. In other words, the punishment provided for a violation of this statute takes a wide range varying according to the facts of each case, but in any case of conviction the punishment may be a sentence to the penitentiary. This fixes the degree of the crime as a felony. *Clifton v. State*, 73 Ala. 475; 16 *Corpus Juris* 55 (3).

"The fact that lesser punishments are provided in the statute does not alter the degree of the crime, which is classed as a felony under the section of the Code above referred to."

Applying the holding in the Hall case, supra, to Act #427, supra, it appears that the degree of crime fixed by that Act is likewise a felony.

Title 11, Section 81, Code of Alabama 1940, reads as follows:

"§ 81. Fees in misdemeanor cases where defendant pleads guilty.—In all misdemeanor cases for violation of any of the provisions of titles 23 and 36 cognizable in justice of the peace courts, courts created in lieu of justice of the peace courts, county courts, inferior courts, law and equity courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases."

It clearly appears from Section 81, quoted above, that the exemption from certain costs on a plea of guilty, and where no appeal is taken, only applies in misdemeanor cases.

Therefore, since the degree of crime fixed by Act #427, supra, is a felony, the provisions of Section 81, supra, do not apply to this Act.

I might add, for your information, that the County Court of Bibb

County does not have jurisdiction to try or to accept pleas of guilty from persons charged with a violation of Act #427, supra. The only jurisdiction that the county court has over persons charged with violation of this act is to sit as a committing magistrate and either discharge the person so held or bind him over to await the action of the grand jury.

You are, therefore, advised that any judgment entered by the county court in the case of **State v. Bliss Hill** is a nullity. It is also my opinion that any act on your part as clerk of this court attempting to assess or fix the costs in this case would also be null and void, and for this reason I do not deem it necessary for me to advise you as to the correctness or incorrectness of any particular item of cost in this proceeding.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 21, 1947.

Honorable O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Clerks—Clerk of Circuit Court—Deputy Clerk—Oaths—Cost Bills—Title 45, Section 72, Title 51, Section 893, Code of Alabama 1940.

1. Statutes requiring cost bills to be sworn to by the clerk must be strictly complied with.

2. A deputy clerk is not authorized to make an oath to a cost bill where statutes requires the clerk himself to make such oath.

3. Title 13, Section 197, Code of Alabama 1940, authorizing the clerk of the circuit court to appoint deputies does not authorize deputy to make an oath to the correctness of cost bills when the statute prescribes that such oath be made by clerk.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 9, 1947, is as follows:

“It has been a practice for the State of Alabama to require the Clerk of the Circuit to personally make oath to the correctness of

cost bills before forwarding same to the State of Alabama for payment.

"I will greatly appreciate an opinion from your office as to whether or not a deputy clerk duly and legally appointed as such by the Circuit Clerk can or can not make such oath acting for and in behalf of the Circuit Clerk or the Circuit Clerk do so by and through his deputy clerk.

"The following sections of the 1940 Code of Alabama may be of some assistance to you in rendering the aforesaid opinion.

"Section 197, Title 13, Paragraph 2—Their authority—Clerks of the circuit court have authority:

"To appoint deputies, with full power to transact all business of such clerks, such deputies first taking an oath to support the constitution and laws of this state, and faithfully to discharge the duties of deputy clerks of the court for which they act.

"Section 72, Title 45—Clerk must swear to bill of costs; limit; how paid.

"After such conviction, the clerk of the court in which the conviction is had, shall make out a bill of the costs in the case, containing no items not enumerated in the preceding sections; he shall make oath to the correctness of each item of said bill, and that the same is a legal charge against the defendant; he shall forward the bill of costs to the directors, who shall carefully examine the same, and if found correct, he shall request the comptroller in writing to draw his warrant upon the treasurer for the payment of said bill to said clerk out of the convict fund. No costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall be paid when he is delivered to such officials.

"Section 893, Title 51—Payment of court costs.

"Any court costs taxed against the state, shall be paid by the state, and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. The sworn certificate of the clerk or register approved by the comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, and shall be treated as a preferred claim.

"I appreciate your assistance in the past and thank you in advance for an early answer to this request as, if possible, it will be a great saving of time and trouble if a deputy clerk can make oath to said clerk in the absence of the clerk."

In my opinion, the circuit clerk personally must make oath to the correctness of cost bills submitted to the State of Alabama for payment, and such oath cannot be made by the deputy clerk.

The two statutes quoted in your inquiry, Title 45, Section 72, Code of Alabama 1940, and Title 51, Section 893, Code of Alabama 1940, respectively, provide in part:

"... The clerk of the court ... shall make out a bill of the costs ... He shall make oath to the correctness of each item of said bill. ..."

"The sworn certificate of the clerk ... approved by the comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, ..."

The above quoted portions of these statutes, prescribing the method for the submission of cost bills to the State, require that the clerk swear to the correctness of the items in said cost bills. Without considering any other provision of law, there would be no question but that these statutes would require the clerk personally to present his claim in the manner prescribed by law, namely, by attaching his oath that the items on the cost bill were correct.

However, Title 13, Section 179, Subsection 2, Code of Alabama 1940, authorizes the clerk of the circuit court to appoint deputies "with full power to transact all business of such clerks." In my judgment, Subsection 2, *supra*, does not authorize the circuit clerk to delegate to his deputy the authority to make an oath which, by statute, is specifically required of the clerk himself.

As a general proposition of law, statutory provisions pointing out who may make an affidavit in particular circumstances or for particular purposes are usually held to exclude others from so doing. 2 C. J. S. p. 926, Section 2. And where a statute specifically points out who may make a certain affidavit, it can be made by no other than those specified. 2 C. J. p. 320, Section 9.

It has been held that a deputy clerk may perform any ministerial act which the principal could perform. A ministerial duty is defined as follows:

"The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act." *Lucas v. Belcher*, 20 Ala. App. 507, 103 So. 909.

In my opinion, the act required of the clerk in making oath that a cost bill is true and correct and that the items thereon are correct in-

cludes the exercise of discretion. The act of swearing to the correctness of a cost bill, in my judgment, is not purely ministerial, but involves in each case the exercise of discretion.

In my judgment, therefore, the deputy clerk could not perform the act of swearing to the cost bills for the clerk himself on the theory that the act of swearing was purely ministerial.

A cost bill addressed to the State of Alabama is a claim against the State of Alabama. The statute prescribes the specific manner in which such claims should be presented. The mode pointed out requires an oath to be made by the clerk. In my judgment, the method for presenting such claims to the State must be strictly complied with. It results that the clerk himself must swear to the correctness of cost bills presented under the provisions of Title 45, Section 72, and Title 51, Section 893, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

May 23, 1947.

Mr. Jimmy Hitchcock,
Associate Commissioner,
Alabama Public Service Commission,
Montgomery, Alabama.

Act No. 669, General Acts of 1939, p. 1064—Approved July 5, 1940—Alabama Motor Carrier Act of 1939.

A Contractor engaged in the business of setting out poles for a telephone company, who finds it necessary to make only infrequent and occasional hauls from stock piles and creosoting plants incidental to his business—and one who does not hold himself out to be a contract carrier—is not a contract carrier within the meaning of the Alabama Motor Carrier Act of 1939 and is not subject to supervision thereunder.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of March 31, 1947, is as follows:

“The Commission has been requested by a Contractor engaged in setting telephone poles for the Southern Bell Telephone and Telegraph Company, and which occasionally involves the transportation of such poles by his vehicles in intrastate traffic, to advise

whether or not such transportation is subject to the provisions of the Alabama Motor Carrier Act of 1939.

"It appears that this person contracts with the telephone company to set the poles in the ground for a stipulated amount for each pole and generally the stock pile of poles is in close proximity to the job. On occasions, however, the stock pile becomes exhausted and it is necessary for him to transport them from another pile or from a creosoting plant. In this operation he uses his own trucks, which require special equipment for loading, and a charge is made to the telephone company for this additional service.

"It does not appear that this person could by any means be termed a common carrier by motor vehicle as the transportation is not for the general public but there is a possibility, that this service might be that of a contract carrier by motor vehicle. A charge is made for this extra service yet it is performed as part and parcel of his contract."

It is my opinion under the facts stated that the service you refer to is not subject to supervision under the Alabama Motor Carrier Act of 1939 as constituting a contract carrier by motor vehicle.

As you state the matter, the contractor has entered into a contract for the setting out of poles for the Southern Bell Telephone and Telegraph Co. and only occasionally finds it necessary to transport any appreciable distance from a stock pile or creosoting plant. From the facts stated the contractor's business appear to be that of setting out poles for one concern at a contract price. Apparently, he does not hold himself out to the public generally as a contract carrier nor does he apparently hold himself out to the company itself as a contract carrier. The transporting of poles occasionally from stock piles is obviously merely incidental to the real business he engages in, i. e., the setting out of poles for a stipulated amount.

Under the Motor Carrier Act of 1932, specific provision was made for exemption of a person "occasionally" making hauls where such person was not engaged regularly in the transportation business but was engaged primarily in another type business—hauls being incidental thereto and infrequently made. See Biennial Report of Attorney General 1932-34, page 196, for a discussion on point. While I find no specific exemption for "occasional" hauls in the Alabama Motor Carrier Act of 1939, the former legislation is mentioned for the purpose of clarifying probable present legislative intent. This intent in my opinion is that a reasonable construction should be placed on the present law such as would exempt such infrequent and occasional hauls as herein mentioned from supervision under the Alabama Motor Carrier Act of 1939 at the discretion of the Alabama Public Service Commission.

If the individual actually sells the transported poles to the telephone company or if the hauls referred to do not exceed seventy-five

miles in intrastate movement, it appears that specific exemption conclusively attaches to the individual concerned. In connection with such an operation your attention is specifically directed to Section 2, Paragraph A-3, Act No. 669, Gen. Acts 1939, p. 1064, which is a part of the Act known as the "Alabama Motor Carrier Act of 1939." This section relates to the inapplicability of the Act and reads as follows:

"(3) Motor vehicles while used in the intrastate transportation of property when the person furnishing the transportation is legally and regularly engaged in the business of selling such property; also motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales or cotton seed, for a distance not exceeding 75 miles, or fertilizer when being hauled directly to a farm, for a distance not exceeding 150 miles; or trucks hauling road materials and paid by the State of Alabama, for a distance not exceeding 25 miles, and motor vehicles used exclusively in the transportation of milk in thermal or artificially cooled bodies or containers for a distance not exceeding one hundred fifty miles; except that this subsection shall not be construed to exempt from the provisions of this Act any motor carrier who operates under a certificate or permit granted under the authority of the Alabama Public Service Commission. All motor vehicles hauling property for hire and exempt under subsection A(3) of Section 2 must before transporting such property secure a permit from the Department of Revenue of the State of Alabama, which permit shall be furnished without cost upon proper application. Such permit shall be issued under reasonable rules and regulations promulgated by the Department of Revenue of the State of Alabama."

In conclusion it is my opinion that a contractor engaged in the setting out of poles for a telephone company, who finds it necessary to make only infrequent and occasional hauls from stock piles or creosoting plants, incidental to his business—and one who does not hold himself out as a contract carrier—is not a contract carrier within the meaning of the Alabama Motor Carrier Act of 1939 and is not subject to supervision thereunder.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 23, 1947.

Hon. James P. Miller,
County Solicitor,
Lawrence County,
Moulton, Alabama.

Act No. 519, Local Acts of 1927, Page 375, Approved September 9, 1927—Title 11, Section 81, Code of Alabama 1940.

Solicitors—Fees—Lawrence County.

Title 11, Sec. 81, Code of Alabama 1940, providing no solicitor's fees shall be taxed in certain courts under certain conditions, is applicable to the County Court of Lawrence County, although the County Solicitor is on a fee basis.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of April 12, 1947, is as follows:

"Under the provisions of Title 11, Section 81, of the 1940 Code of Alabama, in all misdemeanor cases for the violation of the provisions of Title 23 and 36 of the 1940 Code, cognizable before County Courts, Inferior Courts, and etc., where the defendant pleads guilty, no solicitor's fee shall be taxed or collected in such Courts.

"The Office of County Solicitor for Lawrence County was created by 1927 Local Acts of the Legislature, page 375, which provides that such Solicitor shall receive the same fees and compensation now allowed the Deputy Solicitor of said County. In the cases of Jackson vs. Sherrod 92 So. 481 — 207 Ala. 245 and England vs. State 29 Ala. App. page 423 and 197 So. 365 — 240 Ala. 76, construing Local Act 1919, page 86 and the amendment thereof 1920 Local Acts, page 171, it has been held that the Solicitor of Lawrence County, Alabama is on a fee basis and entitled to all the fees in the County Court in cases where defendants plead guilty or a conviction is obtained.

"In view of the fact that this Office is on a fee basis, kindly advise whether or not the Clerk of the County Court is authorized to tax and collect a Solicitor's fee where a defendant pleads guilty to an offense under Title 23 and 36 of the 1940 Code, and no appeal is taken.

"Other opinions rendered hold that a solicitor's fee cannot be taxed and collected when the requirements of this section of the law are complied with, however, I do not find an express ruling on the question when the Solicitor is on a fee basis."

I am of the opinion that your inquiry should be answered in the negative.

In an opinion of this office reported in Quarterly Report of Attorney General, Volume 38, page 41, it was held that Section 10 of Act No. 249, Local Acts of 1919, page 88, and Act No. 22, General and Local Acts of 1940, Special Session, page 171, amending said Section 10, is unconstitutional insofar as it provides that in cases where a plea of guilty is interposed by the defendant no solicitor's fee shall be taxed or collected in

excess of the fine assessed, and, therefore, the solicitor's fees provided for in Title 11, Section 85, Code of Alabama 1940, were properly chargeable in the County Court of Lawrence County. This opinion considered the cases of *Jackson v. Sherrod* and *England v. State*, cited in your letter of inquiry. The effect of the opinion is that the general law as to solicitor's fees chargeable is applicable to County Court of Lawrence County.

Title 11, Section 81, Code of Alabama 1940, provides as follows:

"§ 81. Fees in misdemeanor cases where defendant pleads guilty.—In all misdemeanor cases for violation of any of the provisions of title 23 and 36 cognizable in justice of the peace courts, courts created in lieu of Justice of the Peace courts, county courts, inferior courts, law and equity courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases."

This section is an exception to the regular solicitor's fees chargeable under Title 11, Section 85, *supra*. Under it no solicitor's fees of any kind shall be taxed in any of the courts covered by its provisions where the requirements thereof are complied with.—Quarterly Report of Attorney General, Vol. 17, page 386.

Although the opinion just cited did not deal specifically with the solicitor's fees of a solicitor on a fee basis, the above rule, in my judgment, is applicable to such a situation. The charging of solicitor's fees is one matter and the disposition of said fees is another. Only those fees authorized by law may be charged. There is no distinction as to the proper solicitor's fees chargeable in the cases of salaried and fee basis solicitors—the fees are the same. The only difference is in the distribution thereof.

Moreover, Title 11, Sec. 81, *supra*, evinces a clear legislative intent to establish a uniform system throughout the State, thereby superseding any alleged local or special laws in conflict therewith.—*Shepherd v. Clements*, 224 Ala. 1, 141 So. 255.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

My 26, 1947.

Hon. Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

TAXATION

License Tax on Recordation of Deeds. Code, Title 51, Section 618.

1. Deeds given to perfect titles for a nominal consideration are entitled to recordation without payment of the license tax, under Code of 1940, Title 51, Section 618.

2. Where a deed on its face shows that it was executed to perfect legal title to real estate described therein for a nominal consideration, the Probate Judge, having no information to the contrary, has a legal right to receive and record it without payment of the license tax.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of February 11, 1947, is as follows:

"I am enclosing a copy of a deed which I have had presented to me for recording and I would like to have your opinion on the following questions:

1. Is this deed subject to the privilege or license tax imposed by Section 618 of Title 51 of the Code of Alabama 1940, or is it an instrument executed for a nominal consideration for the purpose of perfecting the title to real estate?

"2. If the deed, the copy of which is enclosed, in addition to the recitals contained in the deed or in lieu of those recitals, contained a recital that it was 'executed for a nominal consideration for the purpose of perfecting the title to real estate,' would it then be subject to the tax imposed by said section?"

The evident purpose of your question is to ascertain whether or not the deed referred to and a copy of which is attached to your letter, falls within the exception contained in Section 618, Title 51, Code of 1940.

This Section requires that no deed, bill of sale, or other instrument of like character, shall be received for recordation until a license tax is paid, based upon a value classification. This statute expressly excepts from the taxing provisions named conveyances among which are deeds

executed for a nominal consideration for the purpose of perfecting the legal title to real estate.

It is apparent that to receive the benefit of the exception the consideration in the deed must be nominal and the purpose of the deed is to perfect the title to the real estate therein conveyed.

Our Supreme Court has passed upon this identical question in the case of *Long v. Jasper Land Co.*, 217 Ala. 593. In this case the court said that it appeared upon the face of the deed that it came within the very language of the exception and that it was the opinion of the court that the Probate Judge may accept as prima facie correct the recitals of the deed, that it was executed for a nominal consideration for the purpose of perfecting title to the real estate named in the conveyance.

The deed attached to your letter shows expressly that the consideration is nominal and that its purpose was to perfect title to the real estate therein described. The deed also undertakes to recite why the consideration was nominal and that its purpose was to perfect title to the real estate. These recitals, while not absolutely required, are entirely proper.

This case intimates that cases may arise where the Probate Judge had independent knowledge that the recitals of the deeds were a mere subterfuge to cover up a fraud and in such case, investigations may be had. But no such question is raised by your letter. Under this decision it is your legal right to receive for recordation and record the deed without payment of the license tax named in Sec. 618, Tit. 51, of the Code.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 26, 1947.

Miss Addie Wiggins,
City Clerk - Treasurer,
City of Florala,
Covington County,
Florala, Alabama.

MUNICIPAL CORPORATIONS

POWER TO LICENSE AND REGULATE TAXI CABS CARRYING PASSENGERS FOR HIRE.

Under the Constitution of 1901, Section 220 and Title 37, Sections 455 and 735 of the Code of Alabama of 1940, municipalities are vested with authority to determine whether, and to what extent, taxicab service for hire shall be needed and to

fix and determine the streets to be used and to regulate the rates to be charged.

Opinion by Assistant Attorney General Callahan.

Dear Miss Wiggins:

Your request for an official opinion bearing date of March 18, 1947, is as follows:

"Our City has had a request to change our taxi license schedule, which is a maximum charge of 25 cents to any section in the City. The request is that no taxi be allowed to operate within the City for a smaller fare. The cause of this request is on account of the fact that we do have some taxis operating for a 15 cent charge. Please advise whether we may legally set the minimum rate."

Chapter 9, Title 37, Section 455, of the Code of Alabama of 1940 grants power to municipalities to adopt from time to time ordinances carrying into effect or discharge of the powers and duties conferred upon them and to provide for the safety, to preserve the health, etc., of the inhabitants of the municipality. This is a vesting in the municipalities of a police power and applies to ordinances regulating the operation of motor vehicles operating for the purpose of carrying passengers for hire. *Giglio vs. Barrett*, 207 Ala. 278 (92 So. 668).

Chapter 15, Article 3, Title 37, Section 735, of the Code of Alabama vests power in all municipalities to license any exhibition, trade, business, vocation, or profession, not prohibited by the constitution or laws of the State, which may be engaged in or carried on in the city or town; to fix the amount of the license, the term for which it is to run provided they shall not run exceeding one year.

This whole subject has been before our courts many times. I shall refer only to two cases.

In the case of *Bush vs. City of Jasper*, 247 Ala. 359 (24 So. 2d 543), the court was dealing with the power of municipalities to issue licenses to taxicabs operating in the city for the purpose of carrying passengers for hire. The court held that municipalities have an irrevocable discretion to determine whether and to what extent taxicab service is needed and to fix and determine the streets on which the business shall be operated and to name the grantee or grantees authorized to so use the street. This case cites *City of Decatur vs. Meadors*, 235 Ala. 544 (180 So. 550). This case pursued the same line of reasoning and reached the same conclusions.

From the foregoing cited statutes and decisions, it is obvious that the City of Florala has full authority, by ordinance, to name the streets or area in the city where taxicabs may operate and to fix such rates as in its sound discretion are reasonable.

Respectfully,
A. A. CARMICHAEL,
Attorney General.

May 26, 1947.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Title 14, Section 101, Code of Alabama 1940; Title 15, Section 392, Code of Alabama 1940; Title 8, Sections 47 and 55, Code of Alabama 1940. Fines—Game and Fish Conspiracy.

A conviction of a "Conspiracy to hunt at night by means of a headlight" is not a violation of the provisions of the game and fish laws, but comes within the purview of Title 14, Section 101, Code of Alabama 1940. Title 8, Sections 47 and 55, as amended by Act No. 296, General Acts 1945, page 493, approved July 7, 1945, Code of Alabama 1940, have no application in such a case, and a fine collected in connection therewith goes to the County under Title 15, Section 392, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of April 15, 1947, is as follows:

"Your official opinion is requested as to the following question:

"John Doe was convicted of 'Conspiracy to Hunt at Night by means of a Head light.' The Court entered a fine of \$50.00 and costs. The Defendant paid said fine and costs in to this office. Should I, as Clerk of the Court, forward the fine to the State Treasurer for credit of the conservation fund, or should the fine be paid to the County Treasurer?"

"In other words, would or not a conviction for the offense of conspiracy to hunt at night by means of a head light come within the purview of Title 14, Section 101 of the Code of Alabama providing for punishment for conspiracy to commit a misdemeanor, or under the game and fish laws as provided for in Title 8, Section 55?"

"A prompt reply will be greatly appreciated."

In answer to your inquiry, it is my opinion that a conviction of a "Conspiracy to hunt at night by means of headlight" is not a violation of the game and fish laws, but comes within the purview of Title 14, Section 101, Code of Alabama 1940. Consequently, Title 8, Section 47 and Section 55, as amended, Code of Alabama 1940, have no application in such a case, and the fine goes to the County under Title 15, Section 392, Code of Alabama 1940.

Title 8, Section 47, *supra*, provides that all fines and forfeitures collected for violation of the provisions of the game and fish laws in justice or inferior criminal courts be remitted to the Conservation Department.

Title 8, Section 55, *supra*, as amended by Act No. 296, General Acts 1945, page 493, approved July 7, 1945, provides as follows:

“§ 55. Fees of arresting officers.—When an arrest for a violation of the provisions of the game and fish laws is made by a salaried officer and the defendant is convicted, there shall be taxed, as costs, the same fee as a sheriff in this state is entitled to for similar services, and if collected from the defendant shall be immediately remitted by the trial court direct to the director of conservation and said fee shall be used for the purpose of the administration of the game, fish and seafoods division of the department of conservation. If the officer making the arrest be a non-salaried warden or officer, and if said fee is collected from the defendant, such non-salaried warden or officer shall be entitled to said fee and shall receive in addition thereto an informer's fee of one-half of the fine in each case where the information furnished by him results in a conviction and the fine is collected and paid into court. No fee shall be allowed in cases of acquittal.” (Emphasis supplied)

It will be noted that the above referred to code sections apply only to violations of the provisions of the game and fish laws.

The offense of “Hunting at night” is set forth and defined in Title 8, Section 86, Code of Alabama 1940, and embraces “Hunting at night by means of headlight” with certain exceptions not here material. This section does not include the offense of a “Conspiracy to hunt at night by means of a headlight,” nor is such offense denounced in any of the other provisions of the game and fish laws. It is, in my judgment, a separate and distinct offense cognizable under Title 14, Section 101, *supra*, which is as follows:

“§ 101. Misdemeanor; conspiracy to commit.—Any two or more persons, conspiring together to commit a misdemeanor, shall each, on conviction, be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than three months.”

Since the offense under consideration is not a violation of the game and fish laws, Title 8, Section 47 and Section 55, as amended, *supra*, have no application. It is within the purview of Title 14, Section 101, *supra*, and a fine collected in connection therewith should be paid to the county under Title 15, Section 392, *supra*, as there is no other specific provision for its disposition.

The above is in accordance with a letter written to Hon. William A.

Conrad, Clerk, Circuit Court, Mobile, Alabama, dated April 19, 1945, dealing with the same matter as that presented in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 26, 1947.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

MUNICIPAL CORPORATIONS—RECORDERS AND RE-
CORDERS' COURTS—APPEALS—TITLE 37, SECTION 593,
CODE OF ALABAMA 1940.

Unless the Circuit Court or other court of like jurisdiction renders a judgment holding invalid a city ordinance, cities have no right of appeal.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, dated March 31, 1947, is as follows:

"Will you please issue an opinion to me on the following matter?

"A number of cases were tried in Recorder's Court of the City of Gadsden and, on conviction, defendants took appeals to the Circuit Court of Etowah County. The same procedure was followed in all cases, and I have selected one on which to set out this procedure in some detail, as follows:

"One L. R. Johnson was tried on an affidavit and warrant issued out of the Recorder's Court of Gadsden, and convicted of disorderly conduct. Defendant thereupon appealed from said conviction. When the case came up for trial before Circuit Judge W. M. Rayburn, the City Attorney filed two amendments to the City's complaint, one charging disorderly conduct, and the other charging more specifically 'Public Drunkenness.' Defendant filed a motion in writing to quash or strike the complaint (or complaints), stating a number of grounds therefor. All of these grounds were addressed to alleged defects in the original affidavit and warrant. Defendant also, on the same paper containing motion to quash, filed demurrers to the complaint, and to the affidavit filed in Recorder's Court, assigning the same grounds as were set out in the motion to quash. Upon oral arguments of motion and demurrers before the Court, the Court sustained

defendant's demurrers, and granted motion to quash or strike. The city then filed notice of appeal, and motion to set aside the order of the Court granting defendant's motion to set aside the order of the Court granting defendant's motion and demurrers, and discharging defendant from custody. The Court overruled the City's motion, and the City Attorney directed the Clerk to prepare the record for appeal, without making or offering any security for costs of appeal, or any appeal security of any sort.

"The question we would like answered is: 'Can the City of Gadsden take these appeals without being required to make an appeal bond?' We would appreciate your early attention to this matter, since this is the third written request to your office, and time for preparing these records is running short."

I do not have a copy of the motion to quash or a copy of the demurrer filed by the defendant to the complaint. Therefore, I do not know what point was raised by the motion and the demurrer. I assume that the motion and demurrer pointed out some defects in the original affidavit and warrant going toward the insufficiency thereof. If this is true, then the city cannot prosecute an appeal. *The City of Birmingham v. Ridgeway*, 164 Ala. 598, 51 So. 303; *Town of Brighton v. Miles*, 153 Ala. 673, 45 So. 160; Title 37, Section 593, Code of Alabama 1940.

Appeal is statutory, and unless there is some statute giving the city the right to appeal in cases of this kind, then the city cannot legally prosecute an appeal.

Title 37, Section 593, *supra*, gives the city the right of appeal **only** in cases involving the validity of city ordinances, but even in such cases the city must give security for the costs of the appeal. There is nothing in your request that would indicate that the ordinance in question was held invalid by the trial court. If it was not, the city cannot appeal.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 26, 1947.

Honorable G. H. Howard,
Probate Judge of Elmore County,
Wetumpka, Alabama.

ALABAMA MOTOR CARRIER ACT OF 1939
CONTRACT CARRIERS UNDER THIS ACT

1. A person who occasionally or regularly transports passengers in his motor vehicle while using it in going to or from his work or place of business is a contract carrier within the meaning

of the Alabama Motor Carrier Act of 1939, General Acts of 1939, page 164, and is required to have a permit issued to him by the Alabama Public Service Commission.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of April 15, 1947, is as follows:

"We have a party in this county that works in the Mill at Tallassee and drives his car to and from work each day. This is about a thirty five mile round trip.

"Can this party pick up three more persons, none of them living on any bus route, and charge them a small fee each day to meet actual expenses without violating the Public Service Commission laws, or would he be required to qualify with the Commission and pay mileage tax."

In my opinion, your question is controlled by the Alabama Motor Carrier Act of 1939. This Act is designated as Act No. 669, General Acts 1939, pages 1064-1090.

This Act was approved July 5, 1940, and hence is not affected by the Act approved July 2, 1940, adopting the Code of Alabama of 1940. See first page, Titles 1-6, Code of Alabama 1940.

Section 1 of this Act in subsection F defines the term "Common carrier by motor vehicle" as meaning any person who undertakes to transport passengers or property for the general public by motor vehicle for compensation.

This same Section 1, subsection G, defines the term "Contract carrier by motor vehicle" as meaning a person who under special or individual contract or agreement, under special or individual contract or special or individual agreements, whether directly or by lease or any other arrangement transports passengers or property by motor vehicle for compensation.

Section 2 of the Act (page 1066) exempts from the provisions of the statute named persons and motor vehicles under certain conditions, none of which include a carrier such as now under review. Section 3 of the Act (page 1067) provides that no motor carrier, as defined in the Act, not herein exempt, shall operate any motor vehicle for the transportation of passengers or property for compensation on any highway in the State except in accordance with the provisions of the Act; and that every such carrier is declared to be subject to control, supervision, and regulation by the Commission (Alabama Public Service Commission).

In Section 11 of the Act (page 1072) it is provided that no person shall engage in the business of a contract carrier by motor vehicle in intrastate commerce on any highway of the State of Alabama unless there is in force, with respect to such carrier, a permit issued by the Commission authorizing such person to engage in such business.

Subsection B of this section provides for the application for the issuance of the permit.

From the foregoing, when construed with the entire Act, it is clear enough that the statute places the person to whom you refer in your letter in the class of contract carriers, and, therefore, he cannot carry for a compensation persons in his motor vehicle while he is going to or from his work or place of business without having a permit therefor issued to him by the Alabama Public Service Commission.

Respectfully,

A. A. CARMICHAEL,
Attorney General.

May 26, 1947.

Honorable Garnett Stancil, Mayor,
Town of Centreville,
Bibb County
Centreville, Alabama.

Taxation—Motor Vehicles—Licenses—

Title 51, Sections 693, 694 and 695, Code of Alabama 1940.

1. A license and tag issued to owners for private use of motor vehicles and a license and tag issued to a motor vehicle for hire under Title 51, Sections 693, 694, and 695, Code of Alabama 1940, does not authorize the holder of such licenses and tags to interchange the tags so as to use the motor vehicle part of the time for private use and part of the time for public use.

2. The law does not contemplate the issuance of a license and a tag for private use of the vehicle and also a license and tag for the same vehicle for public use covering the same period of time.

3. In no event can the licensed vehicle be operated for hire in a territory or area not designated in the license issued for use of the car for hire.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of February 26, 1947, is as follows:

"We would like for your office to rule on the following just as soon as possible:

"Is it lawful for a Taxicab to remove taxi license plate from their car used for a taxi, and replace it with a private license bought for the same car when they are on personal business, or carrying passengers outside of their scope of operation."

Your question requires an examination of Title 51, Sections 693, 694 and 695, Code of Alabama 1940.

Section 693 levies a tax on automobiles and motor cars kept for private use. This section provides that: "Provided, however, that the license tags for such automobiles or motorcycles shall remain with such automobile or motorcycle for the remainder of the current year and that before any private automobile or any motorcycle shall be used on any public highway, the proper license tag therefor must be procured and securely attached to the rear and front ends of the automobile or motorcycle." Section 694 levies a tax on jitney buses for operating on the public highways of the State, and in, or adjacent to cities, and provides that if the jitney bus is operating under circumstances not therein enumerated, the license shall be the same as is provided for automobiles for transportation of passengers paying fares. This last provision obviously has reference to the immediately preceding section dealing with private licenses. Section 695 levies a tax on automobiles, motor cars, or motor buses used for transporting passengers for hire. This section, under subdivision (b), requires that the person desiring to take out a license, with some exceptions not here pertinent, shall, at the time he applies for such license, make out in writing a statement describing the routes over which such motor vehicle shall be operated and naming the terminating points thereof and such route shall be plainly indicated on the motor vehicle.

Construing the above cited sections together, it is manifested that it was the mind of the legislature to separately levy a tax on motor vehicles to be used for the purpose of transporting passengers for hire and require separate license and tags. Clearly it was the intention of the legislature that the tags, no more than the licenses, could not be interchanged. The vehicles could not be used one day or one hour for private use and the same vehicle used the next day or hour for a public service and vice versa. In either event, the vehicle carrying passengers for hire outside the area described in the license would be operating without license therefor. The law does not contemplate that two licenses and two tags shall be issued on the same car, one for private use and the other for public use.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 28, 1947.

Hon. F. H. Norton,
Judge of Probate,
Cherokee County,
Centre, Alabama.

STATUTES
LOCAL ACTS OF 1943, P. 78

1. Under the Local Act of the Legislature of 1943, page 78, fixing the salary of the Probate Judge of Cherokee County at \$3,000 in lieu of all fees, compensations and allowances theretofore allowed to him under the law, he is not entitled, in addition to his salary, to the fee fixed by law for celebrating rites of matrimony.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion under date of February 25, 1947, is as follows:

"Under an Act of the Legislature of Alabama approved June 17, 1943, Local Acts of Alabama of 1943, page 78, the Probate Judge of Cherokee County, Alabama, was placed on a salary basis.

"Section 18 of Title 34 of the Code of Alabama 1940, provides that 'Any judge, - - - celebrating the rights of matrimony is entitled to \$2.'

"Many times after the working day is over and the Probate Office is closed, couples come to my home for me to perform the marriage ceremony for them. Please advise me if Cherokee County, Alabama, is entitled to receive the fee of \$2 provided by Section 18 of Title 34 for marriages performed by me as Judge of Probate outside of office hours, or am I entitled to receive these fees in addition to the salary fixed by the above referred to Local Act."

The Local Act under review fixes a flat salary of \$3,000 per annum in lieu of fees, compensations and allowances theretofore allowed and paid to the Probate Judge, and it requires him to collect such former fees and allowances and pay the same into the County Treasury. It is impressively obvious that the Legislature intended to pay the Judge the salary of \$3,000 and give the county all such fees as had been allowed him up to the time of the adoption of the Act. In short, the Legislature exchanged a salary of \$3,000 per annum for the fees and compensation theretofore paid to the Probate Judge. The provision that the salary should be "net" is amply explained by the language. It furnishes him with a free personnel to help discharge the duties of the office, which he for-

merly had furnished and paid. It also requires the county to provide the Probate Judge with offices, books, stationery, office equipment, supplies, furniture, typewriters, adding machines, postage and other equipment necessary to equip the office. The statute supplies everything and relieves the Probate Judge from all other expenses of performing the duties of the office. None of the things here itemized that are furnished the Probate Judge are susceptible of being construed to be an allowance of fees.

Section 29, Title 11, of the Code of Alabama 1940, provides for fees and costs to be allowed various officers among whom are the Probate Judges. This schedules something like seventy-five named fees allowed. One of these items is "celebrating rites of Matrimony"—the identical fee now under consideration. This is one of the fees that the Probate Judge under the Act is required by express language to collect and pay into the County Treasury on the first Monday of each month after he collects it. If the Probate Judge is entitled to this fee in addition to his salary, then he is entitled to any one of the named fees and by the same token, entitled to all the fees there scheduled. Then the Probate Judge would receive his salary fixed by the Act, and also all the fees that the Judge had formerly received as pay, and thereby be relieved from paying any fees into the County Treasury. The express language of the Act impels the construction that the Probate Judge is not entitled to the scheduled fee for celebrating rights of matrimony.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 28, 1947.

Hon. John G. White,
Secretary-Treasurer,
Association of County Commissioners,
325 Bell Building,
Montgomery 4, Alabama.

COUNTIES — COURTS OF COUNTY COMMISSIONERS —
TRAVELING EXPENSES — EXEMPTION FROM FEDERAL
TRANSPORTATION TAX.

Cost of railroad transportation and seating or sleeping accommodations for members of county governing bodies and county employees attending annual convention of the National Association of County Officials, which cost is paid by the several counties of the State, exempt from the Federal tax on the cost of such transportation and accommodations imposed by Title 26, U. S. C. A., Sections 3469, Sub-sections (a) and (c), and 1650, by virtue of the provisions of Title 26, U. S. C. A., Section 3469, Sub-section (f) (1).

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of May 23, 1947, is as follows:

"Many members of the association of County Commissioners are planning to attend the National Convention meeting in Salt Lake City in July.

"I am asked to inquire if Railroad and Pullman tickets for members of County Governing Bodies and their employees are exempt from payment of the customary 15% Federal Tax."

I understand that "the National Convention meeting in Salt Lake City in July" to which you refer is the annual convention of the National Association of County Officials.

"The customary 15% Federal Tax" to which you refer is the tax levied on the cost of railroad transportation by Title 26, U. S. C. A., Sections 3469, Sub-section (a), and 1650, and on the cost of seating or sleeping accommodations by Title 26, U. S. C. A., Sections 3469, Sub-section (c), and 1650. The effect of Title 26, Section 1650, *supra*, is merely to fix the amount of the tax at 15% instead of at 10% as fixed by Title 26, Section 3469, Sub-sections (a) and (c), *supra*.

Title 26, U. S. C. A., Section 3469, Sub-section (f) (1) provides in pertinent part that: "The tax imposed by this section shall not apply to the payment for transportation or facilities furnished to any State, * * * or political subdivision thereof, * * *."

This office has previously held that the traveling expenses of county officials and employees incurred in attending the annual convention of the National Association of County Officials, at which convention matters concerning the construction and maintenance of public roads are considered, may be paid from the County Road and Bridge Fund, where such expenses are authorized by proper resolution of the county governing body. *Quarterly Report of Attorney General, Volume 41, Page 46. Compare Biennial Report of Attorney General, 1934-1936, Page 160, and Quarterly Report of Attorney General, Volume 20, Page 37.*

If the several counties of the State furnish railroad transportation and seating or sleeping accommodations to members of county governing bodies and county employees attending the annual convention of the National Association of County Officials, such transportation being authorized by proper resolution of the county governing bodies of the several counties of the State, as they have authority to do (see opinions of this office cited above), then the cost of such transportation and accommodations is exempt from the payment of the Federal tax of 15% levied by Title 26, Sections 3469, Sub-sections (a) and (c), and 1650, *supra*, by virtue

of the above quoted provisions of Title 26, Section 3469, Sub-section (f) (1), supra.

It is my information that the Federal Government has "exemption certificates" which may be used in claiming exemption from the Federal tax of 15% on the cost of railroad transportation and seating or sleeping accommodations furnished by the States and their political subdivisions, and it is suggested that these "exemption certificates" be used in claiming the exemption from this tax in the instant case.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1947.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

TAXATION—MORTGAGES—FILING TAX—Title 51, Section 619, Code of Alabama 1940.

Instrument examined and held to be mortgage instead of deed, and subject to mortgage tax levied by Title 51, Section 619, Code of Alabama 1940, based upon the sum of \$20,000.00, the amount of the indebtedness secured by the mortgage.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of May 10, 1947, is as follows:

"Inclosed you find an instrument filed in this office on the 9th day of May for recording. Upon reading it over, we came to the conclusion that we would have to collect Deed Tax on One Hundred, forty-four thousand dollars, and Revenue on the one hundred twenty-six thousand dollars, as there was no previous instrument filed in this Office pertaining to the instrument, I am now sending you, but after more consideration and studying the instrument we came to the conclusion that the only consideration stipulated was Twenty thousand dollars, therefore, we would only charge mortgage tax on the Twenty thousand dollars and recording. It so happened that at different times yesterday there were two men in the Office that work for the State Auditing Department, and one gave me the opinion that it would be on the One Hundred forty-four Thousand Deed and One hundred twenty-six thousand mortgage and recording,

and the other gave the opinion it would be on the Twenty thousand dollars and recording, which is my point of view, but after talking to the two, and not being sure, I would appreciate your opinion. Also, one of the Auditors suggested that we write you and send you a copy of the instrument."

The instrument attached to your letter is a mortgage and not a deed. Therefore, said instrument is subject to the mortgage tax but not the deed tax.

While the sum of \$270,000.00 is mentioned in the mortgage, that sum represents the amount for which the mortgagor agreed to build a building for the mortgagee (\$144,000.00 of which has been paid), and has nothing to do with the amount secured by the mortgage. The mortgage also mentions the sum of \$126,000.00, but this sum merely represents the balance due under the building contract, and has nothing to do with the amount secured by the mortgage.

The parties to this instrument agreed that the mortgage should secure the sum of \$20,000.00. Consequently, it is my opinion that the mortgage tax should be based upon the sum of \$20,000.00 and not upon any of the other sums mentioned hereinabove. Title 51, Section 619, Code of Alabama 1940.

Yours very truly

A. A. CARMICHAEL,

Attorney General.

May 29, 1947.

Honorable Thomas H. Boggs,
Circuit Solicitor,
17th Judicial Circuit,
Marengo County,
Linden, Alabama.

Counties—Expenses of Sheriff's Investigation of Crime

Title 54, Sections 9-10, Code of Alabama 1940.

1. Reasonable and necessary expenses of special investigation of crime made by a sheriff at the direction of the circuit solicitor, when approved by the circuit solicitor directing the investigation, may be paid by the county governing body by warrant drawn on the county treasury, under the authority of Title 54, Section 10, Code of Alabama 1940.

2. The opinion of this office appearing in Quarterly Report of Attorney General, Vol. 38, p. 58, is hereby over-ruled and withdrawn.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of May 20, 1947, is as follows:

"In the discharge of my duties as Circuit Solicitor of the 17th Judicial Circuit, I have found it necessary to direct the sheriff of Marengo County to make a special investigation of an alleged violation of the law in Marengo County. This was done in compliance with Title 54, Section 9, Code of Alabama 1940.

"The sheriff, in making this investigation, deems it advisable to have a body exhumed and examined by the State Toxocologist. In this exhumation and examination, it will be necessary to employ the services of common laborers and also an undertaker or undertakers.

"I request your official opinion as to whether or not such expenses, so incurred by the sheriff of Marengo County in such special investigation, may be paid out of the county treasury of Marengo County, upon a detailed sworn statement thereof, accompanied by my written approval, being presented to the county governing body of Marengo County, and the audit and allowance thereof by such county governing body."

It is my opinion that your inquiry should be answered in the affirmative.

Title 54, Section 9, Code of Alabama 1940, referred to in your inquiry, provides as follows:

"The sheriffs in their respective counties whenever directed to do so in writing by such solicitors, or by the attorney general or governor, shall make special investigation of any alleged violation of the law in their counties, and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly, after its preparation, be presented to the official who directed the investigation and if such official be the governor or attorney general he may present it to any solicitor prosecuting criminal causes in the county. The sheriff of the county shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid."

Under the authority of this section you, as circuit solicitor, are authorized to direct the sheriff of any county located within the judicial circuit served by you as circuit solicitor to make a special investigation of any alleged violation of the law in his county and submit to you a

written report setting forth the information obtained as a result of such investigation, together with names of witnesses secured and a summary of what can be proven by such witnesses.

Title 54, Section 10, Code of Alabama 1940, provides that the expenses incurred by the sheriff in conducting such investigation shall be paid in the following manner:

"The expense of such investigation when so ordered shall be paid from the county treasury, upon a warrant properly drawn; and after the report is made, the sheriff shall file with the board of revenue or court of county commissioners a detailed sworn statement of his expenses accompanied by the written approval of the officer directing the investigations, and the board of revenue or court of county commissioners shall audit and allow only so much thereof as it shall find reasonably necessary unless it is approved by the governor or attorney general, in which event they shall allow the amount approved; and for such investigation, in addition to his expenses which may include any actual cost of travel that was necessary, the sheriff shall be allowed a fee of four dollars, but if the investigation consumes one day or less, then a fee of two dollars, and the fee and allowed expenses must be paid in each case from the county treasury upon a warrant drawn according to law. Every such solicitor shall direct the sheriff to make such investigation and report when a written request to that effect setting forth the alleged violation of the law is presented to him signed by twenty-five reputable citizens of the county."

In my opinion, this section affords ample authority for the payment of those expenses reasonably and necessarily incurred by the sheriff in conducting the special investigation directed by you as circuit solicitor. Of course, the sheriff is not given unbridled discretion as to the extent or the types of services which he will employ in making such investigation. You will note that the authority is lodged in the county governing body to audit the claim for such expenses, after it has been approved by you as circuit solicitor. This authority vests in the county governing body the duty to determine whether or not the services for which reimbursement is claimed by the sheriff were reasonably necessary to the conduct of the investigation. If, in the judgment of the county governing body, such services were reasonably necessary to the conduct of such investigation, the county governing body has ample authority to audit and allow the claim therefor. Quarterly Report of Attorney General, Vol. 18, p. 90; Quarterly Report of Attorney General, Vol. 19, p. 320.

You are therefore advised that in the event the county governing body determines that the services for which reimbursement is claimed were reasonably necessary to the conduct of the investigation, and if such claim for expenses is approved by you as circuit solicitor, the county governing body may reimburse the sheriff, by warrant drawn upon the county treasurer, for those expenses claimed, including a reasonable

charge for services rendered by common laborers and an undertaker in the exhumation and examination of a dead body.

Accordingly, the opinion of this office appearing in Quarterly Report of Attorney General, Vol. 38, p. 58, is hereby over-ruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 29, 1947.

Hon. D. M. Weakley, Superintendent,
Alabama Boys Industrial School,
Birmingham 6, Alabama.

Alabama Boys Industrial School—Schools—Appropriations—
Act No. 247, General Acts 1939, page 411.

Funds appropriated to the Alabama Boys Industrial School under the provisions of Act No. 247, General Acts 1939, page 411, "For erections of buildings and to purchase or complete the purchase of lands" may be expended for converting a building now located on the grounds of said school into a library. Such funds may also be expended for putting drain pipes around a new building. However, such funds may not be expended for the purpose of putting down sidewalks, the purchase of shrubbery, or making a "general survey of the School property."

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 16, 1947, is as follows:

"We have an unexpended balance of Twelve or Fifteen Hundred Dollars that was appropriated during the Dixon Administration. This appropriation was for the erection of buildings and to purchase or complete the purchase of lands (Act No. 247, S. 239, approved August 24, 1939, General Acts 1939, page 417.)

"1. Can we spend any of this money for converting a building that is now on the grounds into a library?

"2. Can we spend any of this money for putting down walks, shrubbery, and drain pipes around a new building that is about completed?

"The contract for the new building did not call for walks, shrubbery, nor drain pipes.

"3. Can we spend any of this money for general survey of the School property?"

Act No. 247, General Acts of 1939, page 411, the statute referred to in your inquiry is as follows:

"Section 1. That there is hereby appropriated for the ordinary expenses of the Executive and Judicial Departments of the State, for the interest on the public debt, and for the public schools for each of the four fiscal years ending respectively September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, to be paid out of any monies in the State Treasury not otherwise appropriated the several sums of money hereinafter specified or so much thereof as may be necessary: * * * * * For erections of buildings and to purchase or complete the purchase of lands \$10,000.00, * *"

A question similar to the one presented by your first inquiry was considered in an opinion of this office found in Quarterly Report of Attorney General, Volume 23, page 254. This opinion quoted at length from the case of **Brown v. Graham**, 58 Tex. 254, as follows:

"It is no more than a reasonable construction of language, to hold that power to erect an entire building expressly authorizes the construction of a portion of it. It certainly does by necessary implication.

"Should the commissioners' court come to the conclusion that a larger court house is needed to meet the demands of the public business of their county, and they agree upon its plan and dimensions, and find that they can secure a building conforming to them in every respect, either by erecting a new structure, or altering, repairing and enlarging the old one, and that the latter mode will be less expensive by half than the former, is there any reason in holding that they can levy the tax for the more expensive mode of attaining their object, when they could not for the other, though the structure which is the result is precisely the same in every particular?

"The object of the foregoing provisions of our constitution and statutes was to enable the different counties to provide suitable public edifices, leaving it to the judgment of the proper authorities whether this should be done by building new houses or by repairing and adding to the old one, when they could thus be rendered suitable to the purposes of the county. The word 'erect' contained in all the foregoing provisions, was the most comprehensive term that could be used to embrace all such improvements.

"To hold that a county whose court house, with proper repairs and additions, could be rendered commodious and useful in every

respect, must pull it down and build an entirely new one, would be to charge our law-givers with an intent to encourage an unnecessary expenditure of the public money. Such a consideration would not, in itself, authorize us to infer a power when not expressly given or necessarily implied. Yet when the language used is capable of including authority to do an act not mentioned in terms, such construction of it is greatly aided by considerations of public advantage which it would certainly produce."

Answering your first inquiry, in view of the conclusion reached in the above opinion and the **Brown case, supra**, it is my opinion that converting a building that is now located on the grounds of the Alabama Boys Industrial School into a library would constitute the erection of a building, and that any funds appropriated under the provisions of Act No. 247, *supra*, for the erection of buildings may be expended for such purpose.

In answer to your second inquiry, it is my opinion that the funds under consideration cannot be spent for "putting down walls" or for shrubbery. However, the same may be spent for putting drain pipes around a new building.

"'Erection' as used in a statute giving a lien in favor of mechanics for work performed toward the erection, construction, or finishing of buildings, cannot be construed to include flagging the sidewalks, yards, and approaches of buildings which are being erected. *McDermott v. Palmer*, 8 N. Y. (4 Seld.) 383, 386." Words and Phrases, Permanent Edition, Volume 15, page 101.

It is obvious that the purchase and planting of shrubbery could not have any relation to the erection of a building.

Drain pipes around a building could well be considered a necessary adjunct to the building in that the purpose of having such pipes is to carry off water that otherwise might damage the foundation of the building. Drain pipes might well be considered as much a part of the building as gutters.

Answering your third inquiry, it is without question that the funds under consideration could not be used for "general survey of the School property."

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 29, 1947.

Honorable Pat Byrne,
Commissioner of Licenses,
Mobile County,
P. O. Box 91,
Mobile 1, Alabama.

Licenses—Exemptions—Title 51, Section 494, Code of Alabama 1940.

1. Persons, or organizations, sponsoring concerts, musical entertainments, public lectures, or other public entertainment falling within the purview of Title 51, Section 494, Code of Alabama 1940, are not liable for the license tax levied by such statute if the net proceeds realized from such public entertainment are used exclusively for charitable, school or religious purposes.

2. The word "wholly" as used within Title 51, Section 494, Code of Alabama 1940, means "exclusively" or "to the exclusion of other things."

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, under date of March 21, 1947, is as follows:

"We shall appreciate your official opinion in the following matter:

"A concert was recently held here in Mobile under the auspices of the Lions Club. Out of the gross receipts, the performers had to be paid, and also expenses such as cost of printing the tickets. The net proceeds were given to charity.

"In view of these facts, it is your opinion that the Lions Club was liable for a State and County License?

"Also, please give us your interpretation of the word 'wholly' as used in Section 494, Title 51, Code of Alabama 1940."

The licenses to which you refer in your letter are those licenses levied under the provisions of Title 51, Section 494, Code of Alabama 1940, which statute provides as follows:

"§ 494. Concerts, musical entertainments, etc.—Each concert, musical entertainment, public lecture, or other public entertainment where charges are made for admission, or for the use of any instrument or device or the participation in any exercises or entertainment not given wholly for charitable, school or religious purposes, and not otherwise provided for, ten dollars; but this provision shall not

apply to exhibitions or entertainment given in theaters when the owners or managers thereof have taken out license as owner or manager, and provided further that this license shall not be charged for any lecture course given as part of the course of instruction in any educational institution; provided further that the provisions of this section shall not apply to chautauquas, lecture lyceums, or exhibits held under the auspices of religious or charitable associations. In all cases where such exhibitions shall be in the nature of a continuous show or performance, the license shall be five dollars per day, fifteen dollars per week, or thirty dollars per month."

It is my interpretation of that portion of the above statute applicable to the question here under consideration that under its provisions a license tax is levied upon each concert, musical entertainment, public lecture or other public entertainment, not otherwise included within the license schedule, where a fee is charged for admission thereto, or for the use of any instrument or device forming a part of such entertainment, or for the privilege of participating in any exercise or program conducted as public entertainment, *unless* such concert, musical entertainment, public lecture or other public entertainment be given wholly for charitable, school or religious purposes.

It, therefore, appears that any organization, other than a religious or charitable organization, sponsoring a concert, lecture or other public entertainment falling within the purview of Section 494, *supra*, would be liable for the license fee levied by such section unless the entertainment be given wholly for charitable, school or religious purposes.

This exception, to me, means nothing more than that the net proceeds of such public entertainment be donated to, or used exclusively for, a religious, educational or charitable purpose. If such be the case, it is my opinion that the sponsoring organization would not be liable for the license tax levied under Section 494, *supra*.

In any determination of what public entertainments are given wholly for charitable, school or religious purposes, resort must be had to a definition of the word "wholly."

Such word has been defined as meaning in a whole or complete manner; entirely; completely; to the exclusion of other things; totally and fully. 45 Words and Phrases (Per. Ed.) page 117.

Substantially the same definition will be found within Black's Law Dictionary and Webster's International Dictionary, the authors of both of which define the word as meaning "exclusively" or "to the exclusion of other things."

It is my opinion that such is the meaning of the word as used within Section 494, *supra*. It is my interpretation of the provisions of this statute that exemption will be granted from the payment of the license

tax prescribed for the conducting of any concert, musical entertainment, public lecture or other public entertainment if the net proceeds of such entertainment are donated to, or used exclusively for, any charitable, school or religious purpose.

Under the facts set out in your letter it is my opinion that the sponsoring organization is not liable for the license tax imposed by Section 494, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1947.

Honorable C. J. Coley,
Judge of Probate, Tallapoosa County,
Dadeville, Alabama.

Tallapoosa County—Fine and Forfeiture Fund—Act No. 370, General and Local Acts 1890-91, page 815; Act No. 658, General and Local Acts 1900-01, page 1543; Act No. 75, Local Acts 1907, page 46; Act No. 284, Local Acts 1915, page 152; Act No. 171, Local Acts 1935, page 89; Act No. 138, Local Acts 1939, page 83; Act No. 142, Local Acts 1939, page 84—Section 1429, Code of Alabama 1896; Section 303, Subsection 5, Code of Alabama 1923; Title 12, Sections 33 and 34, Code of Alabama 1940; Title 15, Sections 392-397, Code of Alabama 1940.

1. Act No. 138, General Acts 1939, page 83, is the only local act pertaining to the fine and forfeiture fund of Tallapoosa County which is now applicable to the fine and forfeiture fund of Tallapoosa County. However, Title 12, Sections 33 and 34, and Title 15, Sections 392-397, Code of Alabama 1940, and any other provisions of the general law relating to the fine and forfeiture fund in the various counties are applicable to the fine and forfeiture fund of Tallapoosa County.

2. There is a distinction in the use of the \$2,000.00 appropriated annually to the fine and forfeiture fund from the general fund pursuant to Act No. 138, *supra*, designated as the "Fine and Forfeiture Fund Special," and the current fines and forfeitures collected, designated as the "Fine and Forfeiture Fund Regular." The "Fine and Forfeiture Fund Special" may only be used for the payment of registered state witness certificates and officers scrip, which have been issued since the first day of July, 1937, or which may hereafter be issued; whereas, the "Fine and Forfeiture Fund Regular" may be used for the payment of any claim against the fine and forfeiture fund without regard to the time the same accrued.

3. A transfer of funds from the "Fine and Forfeiture Fund Regular" to the "Fine and Forfeiture Fund Special" will only make for confusion and should not be made.

4. If the county governing body of Tallapoosa County, acting in compliance with Title 12, Section 34, Code of Alabama 1940, so directs, the treasurer of Tallapoosa County may transfer the balance on hand at the end of this fiscal year in the "Fine and Forfeiture Fund Regular," over and above all outstanding registered claims and lawful claims or charges against either the "Fine and Forfeiture Fund Special" or the "Fine and Forfeiture Fund Regular," to the general fund of the county or such special fund thereof as the county governing body may direct.

5. Under the laws applicable to the fine and forfeiture fund of Tallapoosa County, the registered claims of state witnesses have priority over the registered claims of officers of the court.

Opinion by Assistant Attorneys General Garrett and Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of February 24, 1947, is as follows:

"Local Acts of Alabama 1890-1891, page 815, amending Section 4895 of the Code, as to put the claims against the fine and forfeiture fund of officers of the courts, equally with State Witnesses in criminal cases where the State failed to convict so far as Tallapoosa County was concerned.

"Local Acts of Alabama 1900-1901, page 1543, which reads as follows: Section 1—Be it enacted by the General Assembly of Alabama, that all claims for fees and cost heretofore accrued, that may hereafter accrue in favor of any sheriff, or Clerk of the Circuit Court of said County, where the same are by law payable out of the fine and forfeiture fund of said County, upon being first registered after the passage of this Act by the Treasurer of said County as required by sub-section 1429 of the Civil Code, the said claims shall then become payable out of said fund in the order of their registration the same as claims in favor of State Witnesses; and all such claims heretofore registered may be again registered under this Act and become payable in the order of their last registration.

"Local Acts of Alabama 1907, Special Session, page 46, provides in part that the Court of County Commissioners shall make annually, out of the General Fund Account of the County, an appropriation of \$1,250.00, payable to the fine and forfeiture fund to pay fees of State Witnesses in Criminal cases in Circuit Court and

before the Grand Jury and to be paid to the Witnesses direct to whom the certificate was issued; also all fines and forfeitures are to be paid in and become a part of said fund and to be used to discharge claims that are outstanding or may accrue against said fund.

"Local Acts of Alabama 1915, page 152, provides that all script registered before April 1, 1915, payable and is a legal charge against the fine and forfeiture fund.

"Local Acts of Alabama 1935, page 89, Act 171, relating to Tallapoosa County, regulating the Fine and Forfeiture Fund, provides an appropriation of \$3,500.00 annually in two installments of \$1,750.00 to be applied as follows: \$2,500.00 to be used in payment of registered State Witnesses certificates and officers script now payable from the fine and forfeiture fund which may be issued after the passage of this act; also \$1,000.00 each year to pay State Witnesses certificates and officers scripts registered prior to the passage of this act, which are now payable from the fine and forfeiture fund; provides for re-registration of State Witnesses certificate and officers script; method of payment, and penalty for failure to provide adequate appropriation.

"Local Acts of Alabama 1939, page 85, Act 142, repeals Act # 171 of 1935 Local Acts.

"Local Acts 1939, page 83, Act 138, passed in lieu of Local Acts 1935, Act # 171; provides in part an annual appropriation of \$2,000.00 in two installments of \$1,000.00 each to be applied in payment of registered State Witnesses certificates and officers scripts issued after the passage of this Act; approved March 10, 1939.

"The foregoing Local Acts as set out are for reference in determining the current applicable local law regulating the fine and forfeiture funds operations in Tallapoosa County.

"Since the passage of Local Acts 1935, the County Treasurer have maintained two fine and forfeiture accounts, first account was established in conformity with the requirements as set out in Local Acts 1935, applying the \$3,500.00 appropriation as provided for in the Act; also all current fines and forfeitures accruing during the operation of this act was paid in an account with the \$1,000.00 appropriation, and the \$2,500.00 was applied to pay fine and forfeiture claims of State Witnesses and officers script issued after the passage of this Act.

"The 1939 Local Acts of Alabama, Act # 138, provides in part an appropriation of \$2,000.00 annually by the Court of County Commissioners to the Fine and Forfeiture Fund, but makes no provisions as to the disposition of current fines and forfeitures or into what account these funds should revert to.

"The County Treasurer by his construction of the Local Acts 1939; Act # 138, maintains two Fine and Forfeiture Accounts; Fine and Forfeiture Fund Special, which regulates the \$2,000.00 appropriation by the Court of County Commissioners, and is used in the payment of State Witnesses certificates and officers script issued after March 10, 1939; also the Treasurer maintains another Fine and Forfeiture Fund Account, identified as Fine and Forfeiture Fund Account Regular, and in the last named account all current fine and forfeiture are paid, and to be used for the payment of registered State Witnesses fees and officers script issued prior to March 10, 1939. No part of the current fine and forfeitures are used to pay State Witnesses fees and officers script issued since March 10, 1939, but all revert to the Fine and Forfeiture Account Regular, which has a surplus of approximately \$9,000.00, and outstanding registered obligations which are payable by law the sum of approximately \$500.00.

"I respectfully request your official opinion in answer to the propound questions in order as submitted.

"(1) Is Local Acts 1939, Act # 138, the only law which regulates the Fine and Forfeiture Fund, Tallapoosa County.

"(2) If your answer to question One is in the affirmative, then should there be a distinction in the use of funds identified as \$2,000.00 annual appropriation by the County Governing Body, and the current fine and forfeitures collected, so far as paying State Witness fees and officers script now payable by law, registered and outstanding.

"(3) Can the County Treasurer legally transfer funds in the amount of outstanding registered claims which are now in the account identified as Fine and Forfeiture Fund Regular to the account which is identified as Fine and Forfeiture Fund Special, being the account set up by the Treasurer in conformity with Local Acts 1939, Act # 138.

"(4) After the Court of County Commissioners have acted in compliance with Title 12, Section 34, Code of 1940, authorizing the Treasurer to transfer to the General or Special Fund Account of the County all excess accumulation above the registered claims now payable by law issued prior to March 10, 1939, and outstanding, should the Treasurer make a transfer of funds in accordance with the resolution as passed by the County Governing Body.

"(5) If your answer to question One is in part in the negative, then designate all other local or general laws which govern the fine and forfeiture fund of Tallapoosa County.

"(6) Under the applicable laws to the fine and forfeiture fund of Tallapoosa County does State Witness certificates have priority over that of the officers of the court."

An answer to your inquiries involves a consideration of the following local acts pertaining to the fine and forfeiture fund of Tallapoosa County (all of which are referred to in your letter of inquiry): Act No. 370, General and Local Acts 1890-91, page 815; Act No. 658, General and Local Acts 1900-01, page 1543; Act No. 75, Local Acts 1907, page 46; Act No. 284, Local Acts 1915, page 152; Act No. 171, Local Acts 1935, page 89; Act No. 138, Local Acts 1939, page 33; Act No. 142, Local Acts 1939, page 84. These acts will be considered in the order in which the same were enacted.

Premitting consideration of whether or not Act No. 370, *supra*, was repealed by Section 1429, Code of Alabama 1896, or by Act No. 658, *supra*, or by Section 211, Code of Alabama 1907, and also premitting consideration of whether or not Act No. 658, *supra*, was repealed by Section 211, Code of Alabama 1907, it appears that both of these acts were definitely repealed by Section 303, Subsection 5, Code of Alabama 1923, if the same had not been previously repealed. This subsection provides for the numbering, registration, and payment of the registered claims of state witnesses and officers of the court out of the fine and forfeiture fund and provides: "All local laws in conflict herewith are hereby expressly repealed." (A like proviso is contained in Title 12, Section 33, Code of Alabama 1940, the successor of Section 303, Code of Alabama 1923.) This section provided a different order of payment of such claims from that provided in Act No. 370, *supra*, and Act No. 658, *supra*, and, consequently, repealed said acts by implication, if the same had not been previously repealed.

Act No. 75, *supra*, which provides for an annual appropriation out of the general fund of Tallapoosa County to the fine and forfeiture fund of said county for the payment of the fees of state witnesses, which accrued after the passage of that act, and made other provisions in regard to the fine and forfeiture fund not here material, appears to have been repealed by necessary implication by Act No. 171, *supra*, which also authorized and required an annual appropriation out of the general fund of Tallapoosa County to the fine and forfeiture fund of said county for the purpose of paying registered state witness certificates and officers scrip payable out of the fine and forfeiture fund, which were then or might thereafter become a claim against the county, and contained somewhat detailed provisions as to the registration of claims against said fund and the order and priority of payment of such claims.

Act No. 284, *supra*, merely ratified and made legal all claims and scrip registered with the treasurer of Tallapoosa County against the fine and forfeiture fund of said county prior to April 1, 1915, and authorized and empowered the treasurer to pay the same out of the fine and forfeiture fund of the county. This accomplished, "its interest is historic and evidential only" and "it is then consigned to the limbo of things which have served their purpose." *Southern Industrial Institute v. Lee*, 234 Ala. 404, 175 So. 365, and cases therein cited.

Act No. 171, *supra*, was expressly repealed by Act No. 142, *supra*.

Thus, it appears that the only local act dealing with the fine and forfeiture fund of Tallapoosa County, to which I have been cited, which is still applicable, is Act No. 138, supra. Section 1 of this act authorizes and requires the county governing body of Tallapoosa County to appropriate the sum of \$2,000.00 annually out of the general fund to the credit of the fine and forfeiture fund of the county. Section 2 thereof requires the treasurer or custodian of county funds to apply the amount so appropriated exclusively to the payment of registered state witness certificates and officers scrip payable out of the fine and forfeiture fund, which were then a claim, or which might thereafter become a claim against the county. Section 3 thereof requires him to apply the amount so appropriated exclusively for the payment of such certificates and scrip which might be issued after the passage of the act, or which had been issued since the first day of July, 1937. At first blush, there appears to be an irreconcilable conflict between Sections 2 and 3. However, a careful consideration of the two sections, in *pari materia*, discloses a legislative intent that the amount so appropriated shall be used only for the payment of registered state witness certificates and officers scrip payable out of the fine and forfeiture fund, which had been issued since the first day of July, 1937, or which might be issued after the passage of the act. Therefore, I advise you that the \$2,000.00, which the county governing body of Tallapoosa County is authorized and required to appropriate annually out of the general fund of the county to the fine and forfeiture fund thereof, may only be used for the payment of registered state witness certificates and officers scrip, which have been issued since the first day of July, 1937, or which may hereafter be issued, and for no other purpose whatsoever.

Inasmuch as this act does not provide for the numbering and registration of claims against the fine and forfeiture fund of Tallapoosa County, and the order and priority of their payment, it is my opinion that these matters are governed by the provisions of the general law on this subject, Title 12, Section 33, and Title 15, Section 393, Code of Alabama 1940, as to this \$2,000.00 annual appropriation, designated by the county treasurer of Tallapoosa County as the "Fine and Forfeiture Fund Special," just as are such matters governed by these sections as to the fund designated by the county treasurer as the "Fine and Forfeiture Fund Regular," into which all current fines and forfeitures are paid.

In the light of what has been said hereinabove, your specific inquiries may be answered as follows:

(1) Act No. 138, supra, is the only local act pertaining to the fine and forfeiture fund of Tallapoosa County, to which I have been cited (and I have found no others), which is now applicable to the fine and forfeiture fund of Tallapoosa County. However, Title 12, Sections 33 and 34, and Title 15, Sections 392-397, Code of Alabama 1940, and any other provisions of the general law relating to the fine and forfeiture fund in the various counties of the State are applicable to the fine and forfeiture fund of Tallapoosa County.

(2) There is a distinction in the use of the \$2,000.00 appropriated annually to the fine and forfeiture fund from the general fund, designated as the "Fine and Forfeiture Fund Special," and the current fines and forfeitures collected, designated as the "Fine and Forfeiture Fund Regular." The "Fine and Forfeiture Fund Special" may only be used for the payment of registered state witness certificates and officers scrip, which have been issued since the first day of July, 1937, or which may hereafter be issued; whereas, the "Fine and Forfeiture Fund Regular" may be used for the payment of any claim against the fine and forfeiture fund, without regard to the time the same accrued. In this connection, I might say that there is no objection to the payment of all registered state witness certificates and officers scrip, which have been issued since the first day of July, 1937, or which may hereafter be issued, out of the "Fine and Forfeiture Fund Special," provided there is a sufficient amount in the "Fine and Forfeiture Fund Special" to pay such claims, and the use of the "Fine and Forfeiture Fund Regular" only for the payment of registered state witness certificates and officers scrip issued on or prior to the first day of July, 1937, and claims against the fine and forfeiture fund other than registered state witness certificates and officers scrip, if any there be. However, if the "Fine and Forfeiture Fund Special" is not sufficient to pay all registered state witness certificates and officers scrip issued since the first day of July, 1937, or which may hereafter be issued, then such claims may also be paid out of the "Fine and Forfeiture Fund Regular."

(3) I can see no efficacy in a transfer of funds from the "Fine and Forfeiture Fund Regular" to the "Fine and Forfeiture Fund Special," inasmuch as the "Fine and Forfeiture Fund Regular" may be used to pay any outstanding claims against the fine and forfeiture fund of Tallapoosa County, regardless of when the same accrued; and the "Fine and Forfeiture Fund Special" may only be used for the payment of registered state witness certificates and officers scrip, which have been issued since the first day of July, 1937, or which may hereafter be issued. In my opinion, such a transfer would only make for confusion worse confounded and should not be made.

(4) If the county governing body of Tallapoosa County, acting in compliance with Title 12, Section 34, Code of Alabama 1940, so directs, the treasurer of Tallapoosa County may transfer the balance on hand at the end of this fiscal year in the "Fine and Forfeiture Fund Regular," over and above all outstanding registered claims and lawful claims or charges against either the "Fine and Forfeiture Fund Special" or the "Fine and Forfeiture Fund Regular," to the general fund of the county or such special fund thereof as the county governing body may direct.

(5) I have answered this specific inquiry in answer to your specific inquiry number one.

(6) Under the laws applicable to the fine and forfeiture fund of Tallapoosa County, the registered claims of state witnesses have priority over the registered claims of officers of the court.

I might add that, even though the condition of the "Fine and Forfeiture Fund Regular" in Tallapoosa County may now be such that all claims against the fine and forfeiture fund may be paid therefrom, it will still be necessary for the county governing body of Tallapoosa County to appropriate the sum of \$2,000.00 annually from the general fund of the county to the fine and forfeiture fund thereof, designated as the "Fine and Forfeiture Fund Special," to be used only for the payment of registered state witness certificates and officers scrip, which have been issued since the first day of July, 1937, or which may hereafter be issued, as long as Act No. 138, supra, remains in force and effect. If the condition of the "Fine and Forfeiture Fund Regular" is such that all registered claims against the fine and forfeiture fund of Tallapoosa County may be paid therefrom, it would appear that the repeal of Act No. 138, supra, would be in order.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 30, 1947.

Hon. O. E. Cole,
Chairman,
Court of County Commissioners,
Russell County,
Phenix City, Alabama.

Court of County Commissioners—Russell County—Hiring and
Firing of Bridge Foreman.

1. Individual member is without legal authority to re-employ
a bridge foreman discharged by majority action of the Court.

2. Chairman has no legal authority to sign warrant for such
employee's salary, except for satisfactory services rendered prior
to discharge.

Opinion by Assistant Attorney General Barton.

Daer Sir:

Your request, for an official opinion, dated May 5, 1947, is as follows:

"As Chairman of the Court of County Commissioners of Russell
County, please render me at your very earliest convenience an official
opinion on the following:

"1. Where the Court of County Commissioners by a majority vote
discharged its bridge foreman for cause can one member re-employ
him in his district and force the county to pay his salary?

"2. Is it mandatory upon me as such chairman to sign a warrant for salary as outlined in paragraph one, as per number?

"Please; if possible, let me have your opinion this date."

In my opinion each of your inquiries should be answered in the negative.

The Court of County Commissioners of Russell County was established by Act No. 33, Local Acts 1945, p. 40, approved May 30, 1945. The Court consists of three members, one of which is its chairman. These three members to-gether constitute the Court.

Courts of County Commissioners have general superintendence over the public roads, bridges and ferries within their respective counties. They have legislative, judicial and executive powers as to the construction, maintenance and improvement of public roads, bridges and ferries. Title 23, Section 43, Code of Alabama 1940; Title 12, Sections 16-18, Code of Alabama 1940. County governing bodies are thereby vested with broad powers with respect to public roads, bridges and ferries. Quarterly Report of Attorney General, Vol. 39, page 34.

Where the Court consists of five members, a quorum consists of (a) the Judge of Probate and two commissioners or (b) three commissioners without the Judge of Probate. Title 12, Section 8, Code of Alabama 1940.

If a quorum is present, it only requires a majority of those present to pass upon any question, and not a majority of the entire Court. Biennial Report of Attorney General, 1930-32, page 986.

Since any three members constitute a quorum, the affirmative vote of any two, at a meeting where only three members are present, is sufficient to constitute action of the Court. Quarterly Report of Attorney General, Vol. 30, page 16.

The Court may hire employees, but the employment is done by the action of the Court itself. The power to hire includes the right to discharge employees. Quarterly Report of Attorney General, Vol. 28, page 103.

An individual member of the Court of County Commissioners is without legal authority to employ a person for road work in the district for which that commissioner was elected. Quarterly Report of Attorney General, Vol. 17, page 299.

Therefore, in my opinion, where the Court of County Commissioners consists of three members, as in Russell County, any two of those members constitute a quorum. No affirmative action can be taken without the concurring vote of at least two members. No single member has the power or authority to commit the Court.

It therefore follows that, where by a majority vote the Court has

discharged its bridge foreman, one member cannot, without specific authorization and against the vote of the other two members, re-employ the discharged employee. It follows that it is not mandatory upon the chairman to sign a warrant for the discharged employee's salary, except for satisfactory services rendered prior to his discharge.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

June 4, 1947.

Honorable Frank C. Manning,
Tax Collector, Madison County,
Huntsville, Alabama.

OFFICES AND OFFICERS—TAX COLLECTORS—BONDS—
TITLE 41, SECTION 44, CODE OF ALABAMA 1940.

1. Title 41, Section 44, Code of Alabama 1940, makes the bond of any officer named therein, including the tax collector, a statutory lien on his property.

2. This statutory lien is in the nature of a blanket mortgage on all property owned by the officer when the bond is executed or acquired by him during his term of office.

3. It is security for any liability arising from his malfeasance or misfeasance in office at any time during his term.

4. All persons are chargeable with notice of this statutory lien on the property of the officer by the record of his bond.

5. This section does not prevent an officer therein named from mortgaging, transferring, selling or otherwise conveying property, but merely makes the mortgage, transfer, sale or other conveyance subject to the statutory lien of his bond created thereby.

6. This lien is discharged at the end of one year after the expiration of the term of office of the officer making the bond, if no unsatisfied judgment exists against the bond, and no suit is pending thereon.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of April 3, 1947, is as follows:

"I wish to get your opinion on the following: Can any office holder bond, mortgage or transfer any of his property legally? I want to get a loan on my property and will probably later on want to sell some of. It has been appraised for the amount asked for and this was brought out. If this is true it seems very unfair, as anyone could hold my office without holding one single piece of property and could make bond just as easily.

"I have looked over The Revenue Laws of Alabama printed in 1941 from the Code of 1940 and have failed to find what I'm asking for. I know in going through I could have overlooked it."

The statutory law of this State pertinent to the question raised in your letter of inquiry is found in Title 41, Section 44, Code of Alabama 1940, which reads as follows:

"The bond of the judge of the probate court, of the county clerk, of the sheriff, of the clerk of the circuit court, of the tax assessor, of the tax collector, and of the county treasurer, is a lien upon the property of the principal from the date of its execution; but said lien is discharged at the end of one year after the expiration of the term of office of the principal if no unsatisfied judgment exists against said bond, and no suit is pending thereon."

This section (then Section 2603, Code of Alabama 1923) was fully considered by the Supreme Court of Alabama in the case of First National Bank of Union Springs, et al. v. American Surety Company of New York, 237 Ala. 35 185 So. 365. In this case, the court held:

1. That this section makes the bond of any officer named therein a statutory lien on his property.
2. That this statutory lien is in the nature of a blanket mortgage on all property owned by the officer when the bond is executed or acquired by him during his term of office.
3. That it is security for any liability arising from his malfeasance or misfeasance in office at any time during his term.
4. That all persons are chargeable with notice of this statutory lien on the property of the officer by the record of his bond.
5. That purchasers from or mortgagees of the officer take subject to this statutory lien on his property.

However, this statute does not prevent an officer therein named from mortgaging, transferring, selling, or otherwise conveying his property, but merely makes the mortgage, transfer, sale, or other conveyance subject to the statutory lien of his bond created thereby; and it can be seen from a reading of the statute that the lien is discharged at the end of

one year after the expiration of the term of office of the officer making the bond, if no unsatisfied judgment exists against the bond, and no suit is pending thereon.

Respectfully,

A. A. CARMICHAEL,
Attorney General.

June 5, 1947.

Hon. A. R. Meadows,
Superintendent,
Department of Education,
CAPITOL.

County Superintendent of Education—Perry County—
Salary—Travel Expense—

Act No. 301, Local Acts 1931, Page 146—

Title 52, Section 111, Code of Alabama 1940, as amended by
Act No. 313, General Acts 1943, page 300.

1. The salary of an elective county superintendent of education, whose salary or travel expense has been fixed by the county board of education prior to the commencement of his term of office, cannot be increased during said term.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of May 16, 1947, is as follows:

"I shall thank you to give me your official opinion as to whether the Perry County Board of Education may increase the travel allowance of the Perry County Superintendent of Education in view of the following resolution of the Perry County Board of Education setting the Superintendent's salary and expenses:

"The Superintendent's compensation, for the term beginning July 1, 1945, ending June 30, 1949, be set at \$4,200.00 per year; \$3,600.00 of said compensation to be for his services and paid in twelve monthly payments; \$600.00 of said compensation to be the Superintendent's traveling expenses on official school business, both within and without the county; and this to be paid in twelve monthly installments of \$50.00 each."

My answer to your inquiry is in the negative.

It appears from Act 301, Local Acts 1931, page 146, that the County Superintendent of Perry County is an elective officer.

It appears from Section 6 of Act No. 301, *supra*, that the County Board of Education of Perry County shall fix the salary of the County Superintendent of Education in an amount not less than two thousand dollars per annum.

The provisions for allowing travel expenses to county superintendents of education are found in Title 52, Section 111, Code of Alabama 1940, as amended by Act No. 313, General Acts 1943, page 300. It appears from this section, as amended, in no uncertain terms, that "in counties where superintendents of education are elected by direct vote of the qualified electors, the salary for the office must be fixed prior to the beginning of the term of office."

It appears from the resolution set forth in your request that pursuant to Section 6 of Act No. 301, *supra*, and the provisions of Section 111, as amended, *supra*, the County Board of Education of Perry County had, prior to the beginning of the term of office of the present Superintendent of Education, fixed his compensation at four thousand two hundred dollars per annum, three thousand six hundred dollars of said compensation to be for his services, and six hundred dollars thereof to be used by the County Superintendent of Education as travel allowance.

It is my judgment that the fixing of the compensation of the County Superintendent of Education by the County Board of Education of Perry County at four thousand two hundred dollars per annum prior to the beginning of the term of the present Superintendent of Education precludes the County Board of Education from increasing this compensation.

This office has on several occasions held that when the compensation of an elective superintendent of education is fixed by the county board of education, as provided by Section 111, as amended, *supra*, prior to the beginning of the term of office of the superintendent, the county board cannot, during that term of office, increase such compensation. *Quarterly Report of Attorney General*, Volume 20, page 359; *Quarterly Report of Attorney General*, Volume 8, page 304; *Quarterly Report of Attorney General*, Volume 6, page 98.

Aside from the above, it appears from the resolution passed by the County Board of Education of Perry County that the traveling allowance of said Superintendent of Education is fixed at six hundred dollars per annum. It is to be noted from Section 111, as amended, *supra*, that this is the maximum amount that a county board of education may allow to a superintendent of education for traveling expenses during any one year.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 6, 1947.

Hon. J. A. Pruett,
County Superintendent of Education,
Tallapoosa County,
Dadeville, Alabama.

Schools — County Superintendent of Education — Tallapoosa County—Salary and Expenses—Act No. 238, Local Acts 1931, Page 98—Act No. 313, General Acts 1943, Page 300.

1. Under the provisions of Act No. 238, Local Acts 1931, page 98, the County Board of Education of Tallapoosa County may prescribe that the County Superintendent of Education of Tallapoosa County be paid a salary of not less than \$2100.00 nor more than \$3600.00 annually, the amount of such salary resting within the sound discretion of the County Board of Education of Tallapoosa County.

2. The County Board of Education of Tallapoosa County may, in its discretion, authorize payment to the County Superintendent of Education of Tallapoosa County of those necessary expenses incurred by such County Superintendent of Education while away from his office in the discharge of his duties.

3. Under the provisions of Act No. 313, General Acts 1943, page 300, the amount allowed such County Superintendent of Education as payment for expenses incurred while away from his office in the discharge of his duties must not exceed \$600.00 annually.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 24, 1947, is as follows:

"Under date of June 6, 1931, the legislature passed a local act for Tallapoosa County, Alabama, authorizing a special election to be held to determine whether or not the Superintendent of Education should be elected by the qualified voters of Tallapoosa County or continue to be appointed by the board of education of said county.

"An election was held pursuant to said act and a majority of the voters were in favor of the superintendent being elected by the qualified voters of the county.

"Section 6 of said act provided that the county board of education should determine the amount of salary to be paid said superintendent, which amount was not to be less than \$2100 nor more than

\$3600. Said section also provided for the allowance of necessary expenses incurred by the Superintendent, while away from his office in the discharge of his duties.

"Please advise if the County Board of Education of Tallapoosa County, Alabama, under the present laws of our state and the local laws of Tallapoosa County, is now authorized to set a maximum amount of \$3600 annually as a salary for the County Superintendent of Education, Tallapoosa County, Alabama, also if said Board of Education is authorized to allow an additional amount over and above the \$3600 annually as necessary expenses incurred by said superintendent while away from his office in the discharge of his duties."

It is my opinoin that the County Board of Education of Tallapoosa County may, under the present laws of our State and the local laws of Tallapoosa County, prescribe that the County Superintendent of Education of Tallapoosa County be paid an annual salary of not less than \$2100.00 nor more than \$3600.00, and, in addition thereto, such Superintendent of Education may be paid traveling expenses, not in excess of \$600.00 annually, for those necessary expenses incurred by him while away from his office in the discharge of his duties.

By Act No. 238, Local Acts 1931, page 98, it was provided that a special election be held in Tallapoosa County for the purpose of determining whether the County Superintendent of Education may be elected by the qualified electors of the county, or whether such County Superintendent of Education may be appointed by the County Board of Education. I am given to understand that the result of such election disclosed that it was the will of the voters of Tallapoosa County that the County Superintenden of Education be elected by the qualified electors of such county, and that at the present time the County Superintendent of Education of Tallapoosa County is an officer elected by the qualified electors of the county. This being true, the provisions of Act No. 238, supra, are applicable to your inquiry.

Section 6 of Act No. 238, supra, provides as follows:

"That the salary of said County Superintendent of Education for Tallapoosa County, Alabama, shall be fixed by the County Board of Education of said County, which salary shall not be less than Twenty one hundred dolars nor more than thirty six hundred dollars annually, and which salary shall be paid in the same way and manner as now provided under the general laws of the State of Alabama for the payment of the County Superintendents of Education in the several counties of the State. The County Board of Education of said County shall determine the amount and salary of office help, if any, to the County superintendent, and also as to allowing necessary expenses incurred by him while away from office in discharge of the duties of his office."

It is my interpretation of this section that the County Board of Education of Tallapoosa County may fix the salary of the County Superintendent of Education at any amount not less than \$2100.00 nor greater than \$3600.00 annually. The County Board of Education, being vested with such discretion, may lawfully prescribe that the County Superintendent of Education be paid an annual salary of \$3600.00. It is my further opinion that the County Board of Education, in its discretion, may authorize payment to the County Superintendent of Education of those necessary expenses incurred by him while away from his office in the discharge of his duties. However, such sum should not exceed \$600.00 annually.

That the provisions of the local act are not inconsistent with the State statutes governing this subject, will be seen by reference to Act No. 313, General Acts 1943, page 300, a portion of which act amends Title 52, Section 111, Code of Alabama 1940, and makes the following provision with reference to the compensation to be received by County Superintendents of Education, both as salary and as payment for necessary expenses incurred in the discharge of their duties:

"The county superintendent of education shall devote his entire time to public school business. In counties in which the maximum salary of the county superintendent of education is not fixed by law, the county superintendent of education shall receive such compensation, including salary and travel expenses, as the county board of education shall direct. In counties where superintendents of education are elected by a direct vote of the qualified electors, the salary for the office must be fixed prior to the beginning of the term of office. The Boards of Education in counties where the maximum salary of the superintendent of education is prescribed by law are hereby empowered to fix, approve, and authorize the payment of the traveling expenses not in excess of \$600 annually incurred by the superintendent in the performance of his official duties within and without the county."

It is clear from the provisions of this Act (Act No. 313, supra) and from the provisions of Local Act No. 238, supra, applicable only to Tallapoosa County, that the County Board of Education may, in its discretion, provide that the County Superintendent of Education be paid the maximum salary prescribed by Local Act No. 238, supra (\$3600.00 annually), and that in addition thereto the County Board of Education may, still acting within its discretion, authorize payment to the County Superintendent of Education of those necessary expenses incurred by him while away from his office in the discharge of his duties, such sum not to exceed \$600.00 annually. However, as may be noted from Title 52, Section 111, as amended, supra, his salary must be fixed prior to the beginning of his term of office.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 10, 1947.

Hon. S. G. Johnson,
Ex Officio Chairman,
Court of County Commissioners,
Lamar County,
Vernon, Alabama.

Constitutionality—Lamar County—Clerks of Circuit Court—
Costs and Fees.

1. Act No. 243, Local Acts 1927, page 148, approved August 11, 1927, providing for the recording of the proceedings and the writing of the minutes of the County Court of Lamar County by the Clerk of the Circuit Court, as ex officio Clerk of the County Court, and fixing the compensation therefor, is not violative of Constitution of Alabama 1901, Section 96.

2. Title 11, Section 24, Code of Alabama 1940, as amended by Act 224, General Acts 1943, page 188, approved June 22, 1943, establishing a uniform system throughout the State fixing the ex officio fees of clerks of the circuit courts, supersedes and repeals any local acts on the same subject matter.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 13, 1947, is as follows:

"Please refer to Local Act #243 (Local Acts 1927, page 148) approved August 11, 1927, making it the duty of the Clerk of the Circuit Court of Lamar County, Alabama, as Ex-Officio Clerk of the County Court, to record the proceedings and write up the minutes of the county court and to provide for the compensation of the same, and to your ruling under date of March 30, 1939, found on page 295, Vol. 14, Quarterly reports, holding that 'in the county court there are various orders of the court that have to go in the minutes of the court such as judgments, orders, and the sentences pronounced on the judgment, and all are necessary entries upon the minutes of the Court. CARMICHAEL v. MATHEWS, 134 Ala. 210. There must be a judgment in every case tried in the county court and there must be a sentence or a pronouncement of the court in every case disposed of in said county court. Therefore, the clerk of the county court must write these minutes,' to Section 23, Title 11, Code of Alabama 1940, which is not applicable to Lamar County, Alabama, as the Ex-officio fees of the clerk of the circuit court of Lamar County, Alabama, under the provisions of Section 24, Title 11, Code of Alabama, as amended, has been fixed by the court of County Commissioners at one thousand dollars per annum, payable in equal monthly

installments, and advise me whether or not the said local act violates Section 96 of the Constitution."

I am of the opinion that your inquiry should be answered in the negative.

Constitution of Alabama 1901, Section 96, provides as follows:

"Sec. 96. The Legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Act No. 243, Local Acts 1927, page 148, approved August 11, 1927, the local act under consideration, provides for the recording of the proceedings and the writing of the minutes of the County Court of Lamar County by the Clerk of the Circuit Court, as ex officio Clerk of the County Court, and provides for compensation of the same. The only provisions of said act relative to regulating costs and charges of court, or fees, commissions or allowances of public officers are Sections 4 and 5 thereof, which provide as follows:

"Sec. 4. That the Clerk of the Circuit Court of Lamar County, Alabama, as Ex-Officio Clerk of the County Court shall receive such fees for keeping a record of the proceedings of the County Court as are allowed for keeping such records in criminal cases in the Circuit Court.

"Sec. 5. That the Clerk of the Circuit Court of Lamar County, Alabama, as Ex-Officio Clerk of the County Court shall be allowed, out of the County Treasury, two dollars per day for keeping the minutes of the County Court and warrants for such service are to be drawn by the Probate Judge of said County, but said claim shall be first presented to and passed upon by the Commissioners Court of said County."

Section 4, supra, is to the same effect as that portion of Section 3758 of the Code of Alabama 1923, (now Title 11, Section 87, Code of Alabama 1940), which provides: "The clerk of the circuit court who by law shall be made ex officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the circuit court."

Section 5, supra, is to the same effect as Section 7279, Code of 1923, (now Title 11, Section 23, Code of Alabama 1940), which provides as follows:

"Clerks of the circuit courts in the counties where the ex-officio fees of clerks are limited to two hundred dollars or less, shall be allowed out of the county treasury of the respective counties two dollars per day for the time the circuit court is in session in the county of which he is clerk, for keeping the minutes of his said court,

warrants for such service to be drawn by the probate judge of the respective counties; but said claim shall be first presented to and passed upon by the commissioners' court or board of revenue of the respective counties."

Section 7279, Code of 1923, was evidently applicable to Lamar County at the time of the enactment of the local act under consideration.

From the foregoing it will be noted that there is no conflict between the above quoted provisions of the local act and the applicable general law at the time the local act became effective. Therefore, it is my opinion that said local act was not violative of Constitution of Alabama 1901, Section 96, *supra*.

In connection with your inquiry, I wish to express the opinion that, in my judgment, Title 11, Section 24, Code of Alabama 1940, as amended by Act No. 224, General Acts 1943, page 188, approved June 22, 1943, establishing a uniform system throughout the State fixing the ex officio fees of clerks of the circuit courts in the several counties of the State, supersedes and repeals any local acts on the same subject matter.—*Isbell v. Shelby County*, 10 Ala. App. 639, 65 So. 706. It, therefore, follows that the ex officio fees of the Clerk of the Circuit Court of Lamar County should be governed by Title 11, Section 24, as amended, Section 5 of your Local Act, *supra*, having been superseded or repealed.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

June 10, 1947.

Honorable Pat Byrne,
Commissioner of Licenses,
Mobile 1, Alabama.

Veterans—Licenses—Exemptions — Taxation — Title 51, Section 860, Code of Alabama 1940—Act No. 353, General Acts 1945, page 570—Act No. 127, General Acts 1945, page 115.

1. A club composed entirely of World War II veterans, which sells tobacco and soft drinks, although an incorporated non-profit organization, is not exempt from the payment of the business and occupational license taxes levied under the revenue laws.

2. The exemptions granted certain veterans from the payment of state, county, and municipal business or occupational licenses are personal exemptions and may not be claimed by, nor allowed, corporations or associations.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion under date of April 16, 1947, is as follows:

"Please advise whether or not a club, composed entirely of World War II Veterans, which sells tobacco and soft drinks, is liable for a license. This Veterans Club is incorporated, but it is understood that it is a non-profit organization."

It is my opinion that the club or society referred to in your letter is liable for the license taxes levied under our revenue statutes.

I presume that such corporation is organized and incorporated under the provisions of Title 10, Sections 139-149, Code of Alabama 1940. However, I find no provision of law declaring such an organization to be exempt from state and county taxation or licenses.

Prior to the effective date of the Code of Alabama 1940 (May 31, 1941), it is quite probable that such an organization could have claimed an exemption from state and county licenses under the authority of Section 7192, Code of Alabama 1923. However, it is significant to note that this statute was rewritten and brought forward into the Code of Alabama 1940 as Title 51, Section 12, thereof, and that such statute, as it now exists, is applicable only to the Young Men's Christian Association and branches and departments thereof, hence can have no application, nor afford any exemption, to the club mentioned in your inquiry.

Also by Act No. 127, General Acts 1945, page 115, the legislature provided that corporations or associations formed and organized in good faith for the social or literary advancement of their members, and not for pecuniary purposes nor for individual profit and used as an adjunct of, or in connection with, any college or university, and approved by the governing body of said college or university, shall be exempt from all state, county and municipal taxation. Clearly, however, this act can grant no exemption to the organization under consideration.

Considering the statutes granting exemptions to certain disabled veterans from the payment of state, county and municipal business or occupational licenses, it is found that Title 51, Section 860, Code of Alabama 1940, specifically provides that no exemption or commutation therein provided for shall be allowed any corporation or association.

Likewise considering the provisions of Act No. 353, General Acts 1945, page 570, which act grants exemption to certain veterans, irrespective of disability, from payment of state, county and municipal business or occupational licenses, it is found that such act also provides that none

of the exemptions provided by such act shall be allowed any corporation or association.

It is clear from the above two provisions that the exemptions granted certain veterans are personal exemptions, and may not be claimed or allowed corporations or associations.

It being established that no exemption from taxation is to be granted unless there is specific authority therefor, it is my opinion that the club mentioned by you in your inquiry is liable for the license taxes prescribed by our revenue statutes.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 12, 1947.

Hon. W. M. Prince, Chairman,
Jefferson County Barber Commission,
Jefferson County,
Birmingham, Alabama.

Schools—Jefferson County—City Board of Education—Barber Commission—Title 52, Section 385, Code of Alabama 1940—Title 62, Section 253, Code of Alabama 1940.

The City Board of Education of Birmingham may establish and maintain a barber college without applying for and obtaining a license from the Barbers' Commission of Jefferson County.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of May 6, 1947, is as follows:

"I would appreciate your advising the Jefferson County Barber Commission whether the Board of Education, acting under vocational education appropriations has the right to establish and operate a barber college without first applying for and obtaining a license issued by the Barber Commission of Jefferson County, Alabama, under Title 62, Section 253, et seq., of the Code of Alabama of 1940.

"The Board of Education through the vocational education department proposes to operate a colored barber college to charge fees for classes in said college. They will admit to the college colored persons applying for entrance who will pay the specified and required fees for the training.

"We requested and obtained from our attorney an opinion regarding this matter, copy of which is attached for your information."

There is no doubt that the State, in the establishment and maintenance of public schools, is exercising a governmental function.

In the case of *Williams v. State*, 230 Ala. 395, 151 So. 507, the court said:

"Without question, public education through a system of public schools is, by the Constitution, as well as by the statutes, a government function in Alabama; indeed a major activity of the state government.

"County boards of education, county superintendents of education, county treasurer of public school funds, school district organizations, are all parts of the state setup in maintaining a system of public schools throughout the state."

See also *State v. Tuscaloosa County*, 233 Ala. 611, 172 So. 892.

In the case of *State, ex rel. McQueen, Attorney General v. Brandon*, 244 Ala. 62, 12 So. 2d 319, the court held that a city board of education is an agency of the State. In this case the court said:

"It may be stated, in short, that the facts in the case are, regardless of what name may be given the body discharging the duties involved here, or regardless of the manner in which the personnel of that body is selected, the inescapable facts are that the essential functioning being performed by the particular body involved (whether it be the city board of education or the county board, a district or a state board), is fulfilling the duties and the carrying out the policies of the sovereign state in educating its youth, under a system of education which the State of Alabama has established for all its educational effort, supervised, administered and maintained as a system established and perpetuated by virtue of the sovereign right of the state to educate its people."

The barber college under consideration is to be established under the provisions of Title 52, Chapter 17 (Sections 381-398), Code of Alabama 1940, which chapter deals with vocational education. Section 385 is as follows:

"The board of education of any county or of any city having a city board of education, may cooperate with the state board of education in the establishment of vocational schools or classes giving instructions in agricultural subjects, in trade or industrial subjects or in home economics subjects and may use any moneys raised by public taxation in the same manner as moneys for other school purposes are used for the maintenance and support of schools."

In view of Section 385, *supra*, it is without question that the City Board of Education of Birmingham, acting in cooperation with the State Board of Education, has authority to establish and operate a barber college. The board, in establishing and operating such school, is acting as an agency of the State in carrying out a governmental function.

To hold that the statutes regulating barbers and barber colleges in Jefferson County (Title 62, Section 253-258, Code of Alabama 1940) are applicable to the City Board of Education of Birmingham would have the same effect as holding that such statutes are applicable to the State of Alabama.

It is a rule of statutory construction that the State is not considered as within the provisions of a statute, however general or comprehensive, unless expressly named therein or included by necessary implication. *Commonwealth v. Allen*, 32 S. W. 2d 42, 235 Ky. 728; *State v. American Book Company*, 69 Kan. 1, 76 Pac. 411. In the *American Book Company* case, *supra*, it was stated:

"It is a rule of interpretation that 'the general language of statutes will be limited to such persons and subjects as it is reasonable to presume the Legislature intended it should apply.' *State v. Smiley*, 65 Kan. 240, 69 Pac. 199. * * * * * 'The King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised ('any person or persons bodies politic or corporate, etc.>') affect not him in the least if they may tend to restrain or diminish any of his rights or interests. For it would be of most mischievous consequence to the public if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject.' 1 Blackstone, Com. 261. This rule has been adapted to the requirements of the political system prevailing in this country, and is now universally recognized. Chancellor Kent states it as follows: 'It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication.' 1 Kent, Com. 460. * * *"

In the case of *Smith v. McCord*, 203 Ala. 347, 83 So. 71, the court said:

"As a general rule of statutory construction, without any express legislative declaration, general words in a statute do not apply to the state, nor affect its rights, unless an intention to the contrary appears. *Ex parte McDonald*, 76 Ala. 603; *State v. Allen*, 71 Ala. 543; *State ex rel. Lott v. Brewer*, 64 Ala. 287. There is no express provision making this statute applicable to the state, nor can we say that there is a necessary implication that it was the intent of the lawmakers to make it apply, simply because the state was not specially excepted from the operation of same. On the other hand, section 3662 of the Code of 1907 recognizes this rule by a special reference to the state."

In the case of **State, ex rel. Lott v. Brewer**, 64 Ala. 287, the court made the following statement:

"Statutes, general in their terms, can not divest or diminish the rights or prerogatives of the sovereign, nor impose upon it liabilities; and they are not so interpreted, unless that idea be clearly and distinctly expressed, or is matter of necessary implication. Upon this foundation rests the maxim, 'Nullum tempus occurrit regi;' and the general rule, that the crown is not bound by a statute unless expressly named."

The following statement is found in the case of **Downing v. City of Russellville**, 241 Ala. 494, 3 So. 2d 34:

"The general rule that statutes dealing with persons are not to be construed to include the state unless clearly so intended applies when such construction would infringe upon the sovereignty or prerogative of the state, or runs counter to the settled public policy of the state. *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465; *Nardone v. United States*, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314."

Title 62, Section 253, Code of Alabama 1940, is as follows:

"It shall be unlawful for any person, partnership, association, or corporation to act as a barber, operate a barber college, barber shop or other like business, to advertise or assume to act as such without a license issued by the barbers' commission of the county wherein such act is done or sought to be done. No partnership, association, or corporation, shall be granted a license, unless every member or officer of such partnership, association, or corporation, who actively engages in the barber business, barber college, or like business of such partnership, association, or corporation, shall hold a license as a barber as hereinafter provided for."

The State of Alabama is not expressly named in the above statute. The words "person, partnership, association or corporation" used in said statute are not broad enough to include the State, nor can it be said that the State might be included in said words by necessary implication.

To hold that the City Board of Education of Birmingham, in establishing and operating a barber college must first obtain a license, would limit the rights of the State, and subject the State to liabilities in the carrying out of a governmental function.

In view of the above conclusions and authorities, it is my opinion that the City Board of Education of Jefferson County may establish and maintain a barber college without applying for and obtaining a license from the Barbers' Commission of Jefferson County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 16, 1947.

Hon. Ralph W. Roberts,
State Registrar,
Department of Health,
Bureau of Vital Statistics,
CAPITOL.

Health—State Registration of Vital Statistics—

Chapter 1, Title 22, Sections 19-44, Alabama Code 1940.

1. Chapter 1, Title 22, Sections 19-44, of the Alabama Code of 1940 provides for making and keeping an official permanent record of births, marriages and deaths for the benefit of the citizens and as an aid in the due administration of the law.

2. As to the record of death, the statute means known existing deaths.

3. The statute has no application to what the law terms presumptive death, such as unexplained absence of a person from his usual place of abode for a period of seven years without information pertaining to him or his whereabouts.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of May 13, 1947, is as follows:

"I have been requested to file a certificate of death in the name of an individual who was presumably drowned while boarding a vessel in the Gulf of Mexico six miles south of Fort Morgan, Baldwin County, Alabama. The body has never been recovered. The Mobile County Coroner has made a formal report which is substantiated by two eye witnesses to the accident.

"This letter is written to ascertain whether or not in your opinion provisions contained in Title 22, Code 1940, relative to the registration of vital records and duties of the State Registrar of Vital Statistics, authorize the filing of a death certificate of presumptive death. If it should be your opinion that certificates of presumptive death can be put on record as legal certificates of death I should like to have you outline the form and content that such a certificate should have and the minimum evidence that should be required."

Your letter and attachments thereto present one legal proposition, Does Chapter 1, Title 22, Sections 19-44 of the Code of Alabama apply to presumptive death? The phrase "presumptive death" is used in its

legal sense and refers to the principles of law that the unexplained absence of a person from his last or usual place of residence without having been heard from for seven years gives rise to a presumption of death. 25 C.J.S. (Death) Section 6. This authority in support of the stated principle cites authorities from Alabama and many other courts.

This is an arbitrary rule rendered necessary on grounds of public policy in order that rights depending on the life of one long absent and unheard of may be settled. This rule is made necessary to meet another presumption of the law that one who is shown to be alive at a given time is presumed to remain alive until the contrary is shown by proof, or until a different presumption arises. 25 C.J.S. (Death), Section 5. **Reid v. State**, 168 Ala. 118, 53 So. 254.

When Title 22, Sections 19-44, here under review, are read together, it is manifest that these provisions are dealing with actual and known death to the authorities engaged in making the record. In every instance set forth in the statutes this is shown to be true. The statute is putting the emphasis on the cause of an existing death. Two outstanding purposes of the statute are, (1) To enable the Health Department to protect the public against disease and, (2) to aid in the detection and enforcement of unlawful or homicidal taking of life.

To make an official record of the death while witnesses are obtainable and before vital facts are destroyed or forgotten, the statute calls for promptness on the part of the authorities in every case. Reports are required to be made ranging from three days (Sec. 22) to the fifth day of the month following the death (Sec. 36).

The promptness here required refutes the idea of waiting seven years and then preparing a death certificate and make a permanent record thereof.

The principle that death is presumed from unexplained absence is a mixed question of law and facts, and both are rebuttable by establishing the existence of the absentee. **National Life and Accident Insurance Company v. Ruffin**, 237 Ala. 401, 187 So. 488. 25 C.J.S. (Death) Section 6, p. 1056, and also Section 7.

All I have here said is not to be confused with the question of evidence to establish a death where a trial is being had based upon the cause of action involving death. Admittedly in such cases death may be established either by direct or circumstantial evidence, or even by a certificate of death filed with the Registrar of Vital Statistics. Title 7, Section 386, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 17, 1947.

Hon. Ward W. McFarland, Director,
State Highway Department,
CAPITOL.

State—Counties—Highways—Farm to Market Roads—Contracts—Act No. 329, General Acts 1943, page 311—Act No. 41, General Acts 1945, page 47.

Under Act No. 329, General Acts 1943, page 311, as amended by Act No. 41, General Acts 1945, page 47, the State Highway Department and a county may enter into a contract for the improvement of a farm to market road in the county, which contract calls for the county to advance a certain sum of money to the State, such sum to be reimbursed to the county by the State out of the money which will accrue to the county as its portion of the State's contribution to the farm to market road program.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request, for an official opinion, dated June 5, 1947, is as follows:

"The undersigned would like to get your official opinion, directed to each of the undersigned, to wit: the Highway Department of the State of Alabama and the Board of Revenue of Montgomery County, Alabama, on the following matter:

"The State of Alabama, through its Highway Department, desires to enter into a contract with Montgomery County, Alabama, which said contract will be in words and figures as per the attached copy.

"Both the Highway Department and County desire to know:

"First, will such a contract (assuming it is executed by the persons called for by its terms and assuming further that the Board of Revenue of Montgomery County adopts a resolution authorizing said contract) be a legal instrument binding the State of Alabama and its Highway Department on one hand and the County of Montgomery on the other hand?

"Second, or, in other words, has the Highway Department the necessary legal authority to make such a contract?

"Third, has the Board of Revenue for Montgomery County the legal authority to make such a contract?

"Your attention is respectfully called to Title 23, Sections 78(4), 78(12) of the Code of Alabama as amended."

The body of the agreement or contract attached to your request, reads as follows:

"This agreement made and entered into this the _____ day of _____, One Thousand Nine Hundred and Forty-Seven, by and between the STATE OF ALABAMA HIGHWAY DEPARTMENT, party of the first part (hereinafter called the State) and MONTGOMERY COUNTY, by and through its Commissioners Court (or Board of Revenue), party of the second part, (hereinafter called the County).

"WHEREAS, Section 13 of the Alabama Farm to Market Road Act of 1943, as amended by House Bill 64, approved June 1, 1945, allotted to each county an amount equal to 1/67 of \$2,500,000 of Federal Funds from the 1947 Federal Aid Secondary Program, with such Federal Aid to be matched by the State and County—share-and-share-alike—from the State-County funds provided in the Act.

"WHEREAS, the above sum for the County is to cover construction costs and engineering and inspection charges in connection therewith.

"NOW, THEREFORE, in consideration of these premises, the mutual covenants herein contained, and the sum of \$1.00 by each of the parties to the other in hand paid, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

"That the State will enter into an agreement with the Public Road Administration covering the improvement of the road and/or bridge from Montgomery to Cecil, known as Project No. S-231(1).

"That the County will pay to the State on or before the award of the contract the sum of \$68,034.51 which represents the difference between the low bid of \$114,391.58 and the 1947 Federal Aid allocation of \$37,313.43 after credit has been given for the sum of \$9,043.64 which is unobligated credit of the County in the State and County Aid Fund. The State will reimburse the County from funds accruing to the credit of the County in the State and County Aid Fund with such reimbursement to begin immediately and to continue until such time as the State and County shall share-and-share alike after the Federal contribution has been deducted.

"Upon completion of the project, a final settlement will be made between the State and County, adjusting overruns and underruns on such a basis whereby the State and County will share equally in the cost thereof."

I am of the opinion that your first inquiry should be answered in the affirmative, that is, such an agreement or contract, properly executed, will be a legal instrument binding on the parties thereto.

An answer to this inquiry involves an interpretation of Act No. 329, General Acts 1943, page 311, as amended by Act No. 41, General Acts

1945, page 47. (Act No. 329, supra, as amended by Act No. 41, supra, appears in the 1945 Cumulative Pocket Part, Code of Alabama 1940, as Title 23, Section 78 (1 - 18).

Act No. 329, supra, is known as the "Farm to Market Road Act of 1943," and its purpose was to provide for State aid in the construction of county or farm to market roads. The purpose of amendatory Act No. 41, supra, was to so change the original act as to make certain that the State and the several counties thereof might have money available to match Federal aid money for use on county (farm to market) roads.

As the means for providing for State aid in the construction of county or farm to market roads, Act No. 329, supra, merely provided that, out of that portion of the state excise tax on gasoline levied by Title 51, Section 647, Code of Alabama 1940, accruing and paid into the state treasury to the credit of the highway department for the public road and bridge fund, pursuant to the provisions of Title 51, Section 657, Code of Alabama 1940, there was appropriated for each fiscal year, beginning with the fiscal year commencing on October 1, 1943, "so much and such part thereof, not to exceed in any event one sixty-seventh part thereof, for any one county, as may (might) be necessary to equal or match the amount of Gasoline Excise Tax payable or to be paid by such county for construction of county roads during such fiscal years, * * * *". The amounts so appropriated were transferred into a special fund in the state treasury to be known as the "State County Aid Fund" (Section 3 of Act No. 329, supra), and any money remaining in the "State County Aid Fund" unexpended or not obligated for the construction of county (farm to market) roads at the end of a fiscal year reverted to the state public road and bridge fund from whence it originally came (Section 11 of Act No. 329, supra). Thus, under Act No. 329, supra, each county only received each fiscal year, such an amount, not to exceed one sixty-seventh part thereof, of this portion of the state excise tax on gasoline as was necessary to equal or match the amount of the state excise tax on gasoline paid by each county for construction of county (farm to market) roads during that fiscal year, and any part thereof unexpended or not obligated for the construction of county (farm to market) roads at the end of a fiscal year reverted to the state public road and bridge fund. Consequently, any money accruing to the benefit of a county in the "State County Aid Fund" under Act No. 329, supra, during a fiscal year which was not necessary to equal or match the amount of the state excise tax on gasoline spent by such county for construction of county (farm to market) roads during such fiscal year was lost to the county at the end of the fiscal year in which it accrued.

However, this situation was changed by amendatory Act No. 41, supra. Section 5 of Act No. 41, supra, amended Section 11 of Act No. 329, supra, to read as follows:

"Any State money remaining in the State County Aid Fund for any county unexpended or not obligated for the construction of county roads at the end of a fiscal year shall revert to and be transferred

and credited to the State Public Road and Bridge Fund; provided, however, beginning with the start of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944, and for three years thereafter, the State Highway Department will set aside monthly for the use of each county under the State Farm-to-Market Act of 1943, 1/67 of 1c of the State's gasoline tax. Any amount not matched by a county will accumulate until the end of the State's fiscal year, closing annually on September 30. The amount unused to the credit of each county at the close of the State's fiscal year will be held by the State Highway Department available for the county to match during or before the close of the next fiscal year. Any amount not matched before the close of this next fiscal year will revert to the State Highway Department."

This Section 11, as amended, is in effect a substitute for both Sections 3 and 11 of Act No. 329, *supra*, for the three years "beginning with the start of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944." Under its provisions, there is no limitation as to the time when the amount of the state excise tax on gasoline which is set aside monthly for the use of each county as the State's contribution to the farm to market road program may be expended, except for the provision that any portion thereof not matched by a county within the fiscal year following the fiscal year in which it accrues to the county will revert to the state public road and bridge fund.

Consequently, the time when a county matches the money which has accrued or which will accrue to it as its portion of the State's contribution to the farm to market road program during these three years is immaterial, so long as it does so no later than the fiscal year following the fiscal year in which the same accrues to it.

From the proposed agreement or contract here under consideration, it appears that the parties thereto desire to improve a certain road and/or bridge in Montgomery County, Alabama, which I am informed is a county or farm to market road, on which Federal aid is available, and that to pay the cost of the same, over and above the amount to be contributed by the Federal Government, Montgomery County is agreeing to match, in advance, a portion of the amount which will accrue to its credit from the State's contribution to the farm to market road program. This entails the county advancing a certain sum of money to the State, such sum to be reimbursed to it by the State out of the money which will accrue to it as its portion of the State's contribution to the farm to market road program. I find no objection in the statute to such a procedure, provided the State does not obligate itself to reimburse the county in an amount greater than the amount which will accrue to it as its portion of the State's contribution to the farm to market road program during the three years "beginning with the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944." Indeed, Section 7 of Act No. 329, *supra*, specifically authorizes a county, by and through its governing body, to make and enter into a contract with the State Highway Department, through the Bureau of County Aid, setting forth the

terms and conditions upon which county (farm to market) roads shall be constructed or improved.

In arriving at this conclusion, I am not unmindful of the fact that Montgomery County, has the right, under existing statutes, to pay the entire cost of the improvement of the road in question. This being true, I do not think that it could be validly contended that the agreement or contract here under consideration provides for Montgomery County to lend its credit to the State of Alabama, and, therefore, it becomes unnecessary to consider whether or not a county has the right to lend its credit to the State.

In view of my answer to your first inquiry, it follows as a matter of course that both parties to the proposed agreement or contract have legal authority to enter into the same.

Sincerely,

A. A. CARMICHAEL,

Attorney General.

June 17, 1947.

Hon. T. R. Ward,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Henry County—Counties—Courts of County Commissioners—
Act No. 205, Local Acts, Extra Session, 1932, page 89; Act No.
298, Local Acts 1939, page 184.

Contracts for the purchase of materials used in the construction and maintenance of roads and bridges in Henry County made without advertising for bids for the same as required by Act No. 298, Local Acts 1939, page 184, are null and void. However, the court of county commissioners, if it sees fit, may pay claims for such purchases under the provisions of Title 12, Section 110, Code of Alabama 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 10, 1947, is as follows:

"During the month of September, 1946, the commissioners court authorized the Road Supervisor to purchase a quantity of bridge lumber at not exceeding the ceiling price. Due to the scarcity of such materials he was authorized to purchase this material where ever available and without advertising for bids. Under this authority

the Road Supervisor gave an order for this lumber without bids and without making requisition and securing a purchase order from the purchasing agent. This was all done during the former administration.

"During this year, and since I have assumed office as Probate Judge, the above mentioned materials have been delivered to the road supervisor and invoices presented for payment in the sum of \$3,460.07. The price asked for this lumber is fair and the commissioners court thinks that payment should be made.

"Will you please give me your opinion as to the legality of such a payment under the above facts."

The office of county road supervisor of Henry County was created by Act No. 205, Local Acts, Extra Session, 1932, page 89. Section 5 of this Act, providing in what manner materials and supplies for the construction and maintenance of roads and bridges in the county must be purchased, has been amended several times. This section, as amended by Act No. 298, Local Acts 1939, page 184, requires that where the amount of the purchase is in excess of \$250.00 "notice must be given by the Road Supervisor that bids will be received for such purchases * * * by advertising same for a period of twenty days by publication once a week for two successive weeks, in a newspaper published in Henry County, and also, by posting notice thereof on the Bulletin board in the county court house for a like period of time. * * *" Section 5 also provides that any purchase made in violation of the provisions of said section "shall be null and void."

In view of the provisions of Section 5, supra, the contract for the purchases under consideration, having been made without advertising for bids as required by said section, are null and void.

However, under the circumstances stated in your inquiry, it is my opinion that the court of county commissioners may, if it sees fit, pay the claims for the purchases under consideration under the provisions of Title 12, Section 110, Code of Alabama 1940, which section provides in part as follows:

"§ 110. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, * * * * *"

Cf: Quarterly Reports of Attorney General, Vol. 10, p. 133, Vol. 13, p. 79, Vol. 14, p. 304, Vol. 15, p. 203, Vol. 18, p. 81.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 17, 1947.

Hon. W. L. Parrish,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Taxation—Filing Tax—Title 9, Section 4, Code of Alabama 1940—Title 47, Sections 178 and 181, Code of Alabama 1940—Title 51, Sections 618 and 619, Code of Alabama 1940.

1. There is no mortgage or deed tax due on a transfer of a mortgage on which the mortgage tax has been paid even though said transfer recites a consideration.

2. There is no mortgage or deed tax due on a release of property from a mortgage even though said release may recite a consideration.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion bearing date of April 26, 1947, is as follows:

"There has been a question raised by the Attorneys of the Clanton Bar whether or not the Judge of Probate should charge deed tax or mortgage tax on transfer of mortgages that recite a consideration and whether he can charge such tax as to releases of property from mortgages where said releases recite a consideration. The Attorneys state that he shall not do so. Won't you please give me your opinion."

Your letter contains two questions. I shall first deal with the question of whether or not you should charge a deed tax or mortgage tax on a transfer of a mortgage which recites a consideration.

This question is, I think, answered by Title 51, Section 618, Code of Alabama 1940, which, so far as here material, reads as follows:

"No deed, bill of sale, or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, **except the transfer of mortgages on real or personal property within this state upon which the mortgage tax has been paid, * * *** shall be received for record * * *." (Emphasis supplied).

I call your particular attention to the underscored exception from which you will observe that there is no deed tax to be paid upon the transfer of a mortgage upon which the mortgage tax has been paid. As a matter of fact, the Supreme Court of the State had so held prior to the time that the exception referred to was written into the statute.

See case of *Garrison, Judge of Probate v. Hamlin*, 215 Ala. 39, 109 So. 106. Later the Court of Appeals of Alabama held to the same effect in the case of *Jefferson County v. Smith*, 23 Ala. App. 421, 125 So. 401, but this decision was handed down after the exception had been written into the statute. The case of *Ex Rel Hamilton v. Williams*, Probate Judge, 214 Ala. 89, 106 So. 500, held that the assignment of a vendor's lien upon which the tax had been paid was not subject to the deed tax. Of course, an assignment is to all intents and purposes a conveyance of the indebtedness secured by the mortgage as well as of the mortgage itself. Such assignment is not "given to secure the payment of any debt," (Title 51, Section 619, Code of Alabama 1940) and would not bear a mortgage tax, assuming, of course, in all the instances referred to, that the mortgage tax had been paid on the mortgage in question. I might also add that the assignment, to be legal, would necessarily recite a consideration.

This brings me to a consideration of the second question propounded by your letter, which is whether or not you can charge a deed tax or mortgage tax on releases of property from mortgages where said releases recite a consideration.

Your second question poses a more difficult problem but, after due consideration, I am of the opinion that such releases as are referred to in your letter should be accepted by you for record without charging or collecting either a deed tax or a mortgage tax. A release has been defined by our Supreme Court as a contract which must be supported by a good or valuable consideration; and, if not so supported, it is nudum pactum. *Hamilton, Tax Collector v. Edmonson*, 235 Ala. 97, 101, 177 So. 743, 746. In this respect, Title 9, Section 4, Code of Alabama 1940, is without application, as the same refers to compromise or adjustment of unliquidated claims.

A release was known in the common law and was defined by Blackstone as follows:

"A release, as defined by Blackstone, 'is a discharge or a conveyance of a man's right in lands or tenements to another that held some former estate in possession. The words generally used therein are demised, released, and forever quitclaimed.' 2 Blackstone's Com. 324. 'So a release to him who has no estate or right is void.' Comyn's Digest, Vol. 7, page 222. 'Both the lease and release were known to, and in use under, the common law. But for the latter to become operative, it had to be made to one having an estate in or possession of the land.' 3 Wash. on Real Prop. (5th Ed.) page 377. See, also, *Branham v. M. & C. C. of San Jose*, 24 Cal. 585." *Sanborn v. Crowds Bros. & Co.*, 99 SW 444, 447.

A release in the sense used by you in your letter appears to fall within Blackstone's definition wherein he defines the same as a discharge of a man's right in lands or tenements to another that held some former estate in possession. The release referred to by you is stated to be "a release of property from mortgages." I think the expression used by you is quite appropriate for most releases do nothing more than release

from the operation of the mortgage certain described parts of the property described in and conveyed by said mortgage. It would require a stretching of the imagination to hold such a release to be a conveyance of property, for it does nothing more than simply to relieve the property described in the release from the operation of the mortgage itself. For example, there might be described in a mortgage, through error, a certain piece of real estate which the mortgagor did not own and to which he claimed no title; and the appropriate way of relieving that property from the operation of the mortgage would certainly be for the mortgagee to execute a release releasing the same from the operation of the mortgage, and in such event, no title would be or could be conveyed by the mortgagee for the simple reason that he had none.

The payment of the indebtedness secured by a mortgage operates to divest the title that passed by the mortgage out of the mortgagee. Title 47, Section 181, Code of Alabama 1940. However, until the mortgage has been properly satisfied of record, the title that the mortgagee procured remains apparently in him, but, by Title 47, Section 178, Code of Alabama 1940, the mortgagee and others therein named are required, upon request in writing of the mortgagor or others in said section named, to "enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust," and the statute further provides that, "Such entry operates as a release of the mortgage or deed of trust, and is a bar to all suits thereon at law or in equity." (Emphasis supplied). No one would contend that the release effected by the entry referred to in Section 178, supra, although the entry recited a valuable consideration, would carry a deed or a mortgage tax; yet, the effect of the release therein referred to is, to all intents and purposes, the same as the mortgagee's release releasing from the operation of the mortgage certain property therein described.

I am, therefore, of the opinion that the release you refer to in your letter, the same being a release of property from the operation of a mortgage, should be received by you for record without requiring the payment of either a deed or a mortgage tax, although said release recites a valuable or a good consideration.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 17, 1947.

Hon. F. J. Weatherford,
Tax Assessor,
Franklin County,
Russellville, Alabama.

TAXATION—ASSESSMENTS—MINERAL RIGHTS—TITLE
51, SECTION 21—TITLE 7, SECTIONS 18 AND 22, CODE OF
ALABAMA 1940.

1. Mineral rights are interests in real estate and subject to assessment for ad valorem taxes as other realty.

2. Mineral rights which have escaped taxation may be assessed by the tax collector as an escape for a period going back for not more than five years plus the current tax year.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion bearing date of May 7, 1947, is as follows:

"Will you kindly give me an opinion from your office as to whether or not Mineral Rights are subject to State and County Ad Valorem taxes same as other property. Here in Franklin County we have several thousand acres of land wherein one party has a title to the mineral rights in and under said lands and another party owns the land or surface rights. The real estate is being assessed and taxes paid regularly, and in some cases the party who owns the mineral rights is assessing and paying taxes on same. However, there is quite a bit of these mineral rights which is owned by parties other than the ones who have title to the land on which they have never paid any tax. In some cases these delinquent assessments on mineral rights go back for a period of twenty-five years or more. Does this failure to assess and pay taxes on these mineral rights void the title to said mineral rights? If not, would my office have the legal authority to go back and assess these mineral rights and force collection of these delinquent taxes?

"Right at this time there is quite a bit of interest in mineral rights in this county due to anticipated exploration for oil, and it is my opinion that these taxes could be collected."

Your inquiry with respect to whether or not mineral rights are subject to state and county ad valorem taxes is answered in the affirmative.

You will note that Title 51, Section 21, Code of Alabama 1940, covers your inquiry in that regard. See subsection (a) thereof which specifically provides, "Every separate or special interest in any land, such as mineral, * * * oil or petroleum, natural gas and the right to remove same

from the soil, or any other interests when such interests are owned by persons other than the owner of the surface or soil," are subjects of taxation. Of course, if the one who owns the surface rights has assessed the entire interests in the property and paid the taxes thereon, then there would be no additional interest, such as mineral rights, that would be subject to taxation. The owner of the surface rights should assess only the surface rights for taxation, and the owner of the mineral rights should assess the mineral rights for taxation. Such separate interests in lands are, of course, assessed as any other interests in real estate, but the assessment should indicate what the interest is, such as mineral rights (M. R.), and if the taxes are not paid, such rights should be advertised and sold by the tax collector as any other real estate.

We also note from your letter that you desire to know whether or not the assessments can be made against the owners of the mineral rights as escapes. If, as indicated hereinabove, the mineral rights have escaped taxation, that is, have not been included in the assessment against the owner of the surface rights, then as tax assessor you would be justified in making an escape assessment against the owners of such mineral rights, going back for a period of five years plus the current tax year. In no event would you be justified in going back further than five years, which does not include the current tax year. This is made clear by the following sections of law and also the following cases:

Title 7, Section 18, Code of Alabama 1940, provides:

"All other civil actions, in law or equity, must be commenced after the cause of action has accrued within the period prescribed in this chapter and not afterwards, unless otherwise specifically provided for in this Code."

Title 7, Section 22, Code of Alabama 1940, provides:

"Limitations of five years.—The following must be commenced within five years: * * * Except as otherwise specifically provided for, all actions by the state or any subdivision thereof for the recovery of amounts claimed for licenses, franchise taxes, or other taxes."

In this connection, I refer you to Quarterly Report of Attorney General, Vol. 14, p. 92. Furthermore, the Supreme Court of this State in the case of *Howell & Graves, Inc. v. Curry, Commissioner of Revenue*, 242 Ala. 122, 126, 5 So. (2d) 105, 109, construing the predecessors of the sections hereinabove quoted, stated:

"The manifest object of subdivision 2 of Sec. 8945, supra, was to set at rest all claims by the State or any subdivision thereof for the recovery of amounts claimed for licenses, franchise taxes or other taxes, after five years from the accrual thereof."

See also the Biennial Report of Attorney General 1936-38, page 748.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 18, 1947.

Hon. Roy J. Akin, Treasurer,
Town of Notasulga,
Macon County,
Notasulga, Alabama.

Municipalities—Licenses—Delivery Tax.

The ordinance of Town of Notasulga imposing fee upon all persons delivering in town merchandise transported from point without the town to point within it, is non-discriminatory in character and valid.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of April 16, 1947, is as follows:

"The Town of Notasulga has a license ordinance reading as follows:

"TRUCKS, or other vehicles: each company, firm or corporation transporting merchandise from a point without the Town of Notasulga to a point within the Town of Notasulga:

- (a) Delivering bread, cakes, candy, peanuts, popcorn, tobaccos, fruits, produce and other perishable goods to retail merchants5.00
- (b) Delivering wholesale merchandise of any kind other than listed above to retail merchants in the Town or Police Jurisdiction10.00
- (c) Selling and delivery retail in the Town or Police Jurisdiction15.00

"Now the West Point Wholesale Grocery Company, West Point, Georgia, whose truck delivers to the merchants here, questions the authority of the Town to tax persons engaged in interstate commerce. They base their claim on the City of Roanoke vs. Stewart Grocery Company case.

"We believe our license schedule is upheld in the case of Sanford vs. the City of Clanton, 15 So. 2nd at page 303.

"The West Point Wholesale Grocery Company is withholding remittance pending our furnishing them with an opinion by you as to our authority to apply the tax in question."

It is my conclusion that the license schedule under consideration is

upheld by *Sanford v. City of Clanton*, 31 Ala. App. 253, 15 So. 2d 303 (certiorari denied, 244 Ala. 671, 15 So. 2d 309). Therefore, I am of the opinion that you have full authority to apply the tax.

City of Roanoke v. Stewart Grocery Company, 235 Ala. 23, 176 So. 820, was decided in 1937 and held that a similar tax was unconstitutional because an unwarranted burden upon interstate commerce. The decision was based upon *Robbins v. Shelby County Taxing District* (1887), 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, and a long line of decisions by the United States Supreme Court construing the question of state taxation as a burden upon interstate commerce.

In 1940, however, the United States Supreme Court decided *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876, and therein expressly narrowed the limits of the *Robbins Case* to fixed-sum license taxes imposed upon the business of soliciting orders for purchase of goods to be shipped interstate. The Alabama Court of Appeals then decided the *Sanford Case* and the Alabama Supreme Court refused certiorari.

In *City of Enterprise v. Fleming*, 240 Ala. 460, 199 So. 691 a similar tax was sustained. The privilege taxed is the privilege of delivering within the town limits, and no question of interstate commerce is involved. The levy is non-discriminatory in character. It does not aim to discriminate against interstate commerce. Equality is its theme. It applies to intrastate and interstate commerce alike. As was said in the *McGoldrick Case*, interstate commerce must bear its fair share of the state tax burden.

Therefore, I construe the law to be that a delivery tax such as the one imposed by the Town of Notasulga is non-discriminatory, constitutional, and valid, and is sustained by the decision in the *Sanford Case*.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

June 24, 1947.

Hon. Pat Byrne,
Commissioner of Licenses,
Mobile County,
Mobile 1, Alabama.

LICENSES—MUNICIPAL CORPORATIONS—POPULATION

1. Where amount of license is rated according to population, population as fixed by last preceding United States census shall govern, is inapplicable to fix tax in city which was non-existent at the last Federal census.

2. The actual population of such cities to be used in determining the rate of license.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of May 20, 1947, is as follows:

"I shall appreciate your opinion in the following matter:

"On November 19th, 1946 the Town of Chickasaw was declared incorporated by the Probate Judge of Mobile County. It is my understanding that a census was taken, revealing 2029 as the population of the Town of Chickasaw.

"Since the amount of certain State and County licenses is determined by the population of the municipality in which a place of business is carried on, should this office, in issuing State and County licenses for businesses operated within the City Limits of Chickasaw, charge according to the given figure of 2029, as the population of Chickasaw?

"For example, if a person sells tobacco and lives in the City limits of Chickasaw, according to Title 51, Section 484, should we still collect \$2.00 for the State or should we collect \$3.00 (annual license)?

"According to Title 51, Section 850, 'In all cases where the amount of license is rated according to the population of the town, city or county, the population of such town, city or county as fixed by the last preceding United States census shall govern.' Since Chickasaw was incorporated after the last census was taken, there is a question in my mind as to when we should collect the higher license."

In answer to your inquiry you are advised that the actual population of the Town of Chickasaw should be used in determining the rate of state and county licenses levied on businesses located within the corporate limits of said town.

The Court of Appeals in the case of *State v. H. G. Fain Service Station*, 23 Ala. App. 239, 124 So. 119, certiorari denied, 220 Ala. 55, 124 So. 121, had occasion to consider the identical proposition as set out in your request. In that case, the City of Homewood was incorporated subsequent to the then existing United States census, and certain business licenses under the then existing Revenue Law were rated according to population of the town or municipality. The Court of Appeals held in that case that the Federal census was to be disregarded and that the actual population of the town was to be used in determining the rate of licenses on businesses located within the corporate limits.

You are, therefore, advised that you should properly rate the license on businesses located within the city limits of Chickasaw on a population basis of 2,029.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 24, 1947.

Hon. Frank A. Reagan,
Judge of Probate Court,
Etowah County,
Gadsden, Alabama.

Title 11, Section 29, Code of Alabama 1940. Act No. 137, Local Acts 1943, page 73, approved June 10, 1943—Judge of Probate on salary basis—Fees.

1. Judge of Probate on salary basis and required to pay into county treasury all fees authorized to be collected by him is responsible for collection of all fees for services performed under Title 11, Section 29, Code of Alabama 1940, or other statutory law.

2. Collection of such fees as a condition precedent to performance of service is discretionary with said Judge of Probate but liability for collection attaches in any event.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, under date of May 23, 1947, is as follows:

"With the beginning of my term of office in January 1947, the Office of the Probate Judge of Etowah County, Alabama, was placed on a fixed salary, as you already know.

"I desire to receive your advices concerning my duty in making collection of costs and fees which may be legally incurred in connection with the administration of estates in the Probate Court of Etowah County, and the extent of my personal liability for failure to collect such costs and fees. It will be very much appreciated if you will advise me generally as to my duty in connection with these costs and fees and will specifically advise me as to the following questions:

"1. Upon the presentation of a petition for the appointment of an administrator of an estate with good and sufficient bond, does the

law require me to collect the costs and fees as a condition precedent to the issuance of letters of administration?

"2. Upon presentation of a petition for the probate of a Last Will and Testament, does the law require me to collect the costs and fees or any part thereof, as a condition precedent to the filing of such petition for probate, and the setting of the date for hearing of same, and the issuance of the notices required by law?

"3. If I do not require the payment in advance of the costs and fees in the instances above referred to, am I subject to personal liability if the costs are never collected?

"4. What is the duty imposed upon the Probate Judge in the issuance of executions or taking other steps to collect the costs and fees in connection with administration proceedings?

"Thanking you for your official instructions with reference to the above inquiries, I am * * * * *

Under Act No. 137, Local Acts 1943, page 73, approved June 10, 1943, the Probate Judge of Etowah County is placed on a salary basis.

Section 2 of this Act reads as follows:

"That when this act goes into effect said judge of probate shall continue to collect all legal charges, costs, fees, compensation and allowances, heretofore or hereafter **authorized to be collected by him**, and shall pay same into the county treasury on the first Monday of each month thereafter." (Emphasis supplied).

It is my opinion that the wording of this statute makes it mandatory for you to collect all such fees that may attach to your office by authority of Title 11, Section 29, Code of Alabama 1940, or other statutory law. The code section noted generally prescribes the fees of judges of probate and covers therein the items you refer to, namely, the issuance of letters of administration, filing of petition for probate of a last will and testament, the setting of the date for hearing of same, and the issuance of notices required by law.

In an analogous opinion of this office to Hon. S. E. Boozer, Judge of Probate of Calhoun County, found in Quarterly Report of Attorney General, Vol. 27, page 28, it was held that Title 11, Section 29, supra, made provision for fees in connection with the copying of instruments and, therefore, photostatic copies of instruments should not be furnished by a judge of probate on a salary basis except upon **payment** of the fee prescribed therefor.

It is my opinion that this former opinion should be modified to the extent that a judge of probate on a salary basis is responsible for the collection of fees for services rendered by virtue of his office, but the collection of said fees as a condition precedent to performance is discretionary with him. In other words, express provisions of law make

it mandatory that he remit specified fees for services rendered, without exception. In many instances, for example, estates with obviously ample funds—a collection in advance would appear to be an unnecessary procedure, detrimental to the expedient functioning of the office of the judge of probate. In such cases of collection being assured, it is my opinion that the judge of probate may use his own discretion in the matter. Responsibility for the ultimate collection of the fees, would, in my opinion, attach to him in any event, and the better practice would be to demand satisfaction of fees in advance in all cases except those where payment in full is assured. However, I believe the proper functioning of the office of judge of probate necessitates that this much discretion be vested in the judge of probate. Accordingly, you are herewith advised that the above opinion noted in Quarterly Report of Attorney General, Vol. 27, page 28, is hereby modified to this extent.

It is specifically emphasized that, in my opinion, personal liability for the collection of all costs and fees authorized by statute attaches to a judge of probate on a salary basis where express provisions of law require that he pay over to the county treasury all fees authorized to be collected by him for performance of services rendered, but the time of collection of said fees is discretionary with him.

In line with the above, your questions submitted are categorically answered as follows:

1. No, as explained above.
2. No, as explained above.
3. Yes.
4. Unnecessary to answer in view of explanation given.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 24, 1947.

Honorable J. J. Cockrell,
Solicitor, Talladega County,
Talladega, Alabama.

Title 14, Section 420, Code of Alabama 1940; Title 36, Section 32, subsection (c), Code of Alabama 1940.

Sunday violations—Automobile and motorcycle racing.

1. It is a violation of the laws of the State of Alabama to engage in automobile and motorcycle racing on Sunday.
2. There is no statute prohibiting automobile and motorcycle racing on secular days in the State of Alabama.

Opinion by Assistant Attorney General John O. Harris.

Dear Sir:

Your request for an official opinion, bearing date of May 8, 1947, is as follows:

"It has been called to my attention that within my county of Talladega there has been prepared and is being maintained a race track where automobile racing, motorcycle racing, is carried on on Sunday.

"I would like to have an opinion on the following questions:

"1. Can racing as above described be maintained on Sunday?

"2. Can racing as above described be maintained during the week?"

In answer to your first inquiry I call your attention to Title 14, Section 420, Code of Alabama 1940, which is as follows:

"CERTAIN ACTS PROHIBITED ON SUNDAY; PUNISHMENT.—Any person who compels his child, apprentice, or servant to perform any labor on Sunday, except the customary domestic duties of daily necessity or comfort, or works of charity; or who engages in shooting, hunting, gaming, card playing, or racing on that day; or who, being a merchant or shopkeeper, druggist excepted, keeps open store on that day, shall be fined not less than ten nor more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than three months; but the provisions of this section do not apply to the running of railroads, stages, or steamboats, or other vessels navigating the waters of this state, or any manufacturing establishment which is required to be kept in constant operation. Nothing herein shall prevent the sale of gasoline or other motor fuels or motor oils on Sunday."

The above quoted Section prohibits racing on Sundays and it is my opinion that automobile and motorcycle racing is included in this prohibition.

Answering your second inquiry, you are advised that I have been unable to find any statute prohibiting automobile or motorcycle racing on secular days in the State of Alabama.

Your attention is directed to Title 36, Section 32, subsection (c), Code of Alabama 1940, which is, in pertinent part, as follows:

"Local authorities may set aside for a given time a specified public highway for speed contests or races, to be conducted under proper restrictions for the safety of the public."

Specifically answering your request, I am of the opinion that your

first inquiry must be answered in the negative and your second inquiry in the affirmative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 25, 1947.

Hon. Frank A. Boswell,

Director,

Department of Corrections & Institutions,

CAPITOL.

State—Department of Corrections and Institutions—Disposition of income derived from lease of lands belonging to Department.

Title 45, Sections 12-13, Code of Alabama 1940.

Title 45, Section 65, Code of Alabama 1940.

Act No. 341, General Acts 1945, p. 554.

1. The income derived from the lease of gas and oil rights to lands owned and operated by the Department of Corrections and Institutions accrues to the benefit of such department and such money should be deposited to the account of the Department of Corrections and Institutions.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of April 25, 1947, is as follows:

"During the year 1944 the Department of Corrections and Institutions, in the name of the State of Alabama, entered into a lease for gas and oil rights with the Skelly Oil Company, Tulsa, Oklahoma, at our Atmore State Prison and we are asking you to advise us whether the money coming from this lease should be deposited to the account of the Department of Corrections & Institutions or into the General Fund.

"When this land was bought, it was paid for from monies belonging to the Department of Corrections and Institutions and the lease covers land which is being cultivated for the maintenance and support of the inmates of the Prison.

"We refer you to Title 45, Section 65 and it seems to us that this money should go to the credit of the Department of Corrections and Institutions in accordance with this opinion.

"I would appreciate very much if you would give us an immediate reply as we are holding something over \$3,000.00 which must be deposited to the account of some department immediately."

In your request for opinion you advise that the lands covered by the lease here in question are agricultural lands located at the Atmore State Prison and, that when purchased for the purpose of becoming a part of the State penal system, the purchase price was paid from monies belonging to the Department of Corrections and Institutions. I have likewise been advised by you, subsequent to the above request, that the legal title to those lands covered by the above mentioned lease is vested in the Department of Corrections and Institutions. You inquire as to whether the income derived from a lease of the gas and oil rights to such lands should accrue to the Department of Corrections and Institutions or to the General Fund of the State of Alabama?

The power and authority of the Director of the Department of Corrections and Institutions to sell and purchase agricultural lands used as a part of the convict system of the state is set out in Title 45, Section 12, Code of Alabama 1940, and is as follows:

"§ 12. Power of director to sell and purchase agricultural lands.—The director, with the approval of the governor, may sell any or all of the lands now used by the state in working convicts, for cash or on credit, as may seem best, and purchase lands superior in quality, to be used by the department in working convicts."

Title 45, Section 13, Code of Alabama 1940, in providing funds for the carrying into effect of the authority granted by the previous section, provides thusly:

"§ 13. Appropriation for the purchase of land.—So much of the funds earned by the department as may be necessary is appropriated and authorized to be paid for such lands as may be purchased under the preceding section and the comptroller, upon the application of the director with the approval of the governor, shall draw his warrant for such sum or sums as may be necessary for such purchase of such lands and the payment thereof."

It is, therefore, to be seen that the Director of the Department of Corrections and Institutions, subject to the approval of the Governor, is vested with broad authority with respect to the acquirement or disposal of lands forming a part of the state convict system. Likewise, that lands so purchased by the Director for use as a part of the state convict system are purchased with funds earned by the Department of Corrections and Institutions. In view of these facts, it is my opinion that the Director, upon approval by the Governor, possessed ample authority to purchase the lands here in question for the use of the Department of Corrections and Institutions, paying for same with money belonging to such Department; and it is my further opinion that, as a result of such a transaction, legal title to such lands should, and does, vest in the Department of Corrections and Institutions.

The authority of the Director of the Department of Corrections and Institutions to rent, or lease, state lands forming a part of the convict system is found in Title 45, Section 65, Code of Alabama 1940, which provides as follows:

“§ 65. Renting out state lands.—Such of the lands owned by the state as are not needed for the use of the convict system may be rented out by the director with the approval of the governor.”

Under the above statute, the Director of the Department of Corrections and Institutions, with the approval of the Governor, has authority to lease the gas and oil rights to agricultural lands located at the Atmore State Prison, if such lands, or such interest in those lands, is no longer needed for the use of the convict system of the state (Quarterly Report of Attorney General, Vol. 32, p. 75).

It is likewise my opinion that, although not specifically provided for by statute, it naturally follows that the income derived from the granting of such lease should accrue to the Department of Corrections and Institutions, inasmuch as such lands were purchased with money belonging to the Department of Corrections and Institutions, legal title to such lands is vested in that department, and such lands are under the direction and control of the Director thereof.

In keeping with, although not pertinent to, this opinion are the provisions of Act No. 341, General Acts 1945, p. 554, which act provides for the creation of the Office of Land Agent within the Department of Conservation, and for the compilation and maintenance of an up-to-date record of all lands owned by the state, or any department or institution thereof. This act also provides that the Department of Conservation shall have jurisdiction, management and control of all unused lands of the state, and further provides that any revenues accruing from such lands, subject to costs of administration, shall be the property of the department or institution to which said lands belong, or in which such department or institution shall own the beneficial interest.

As stated, the provisions of such act are not pertinent to your inquiry, inasmuch as the lease here in question was entered into prior to the effective date of the above act, and also due to the fact that such lease covers “used” rather than “unused” lands, as defined by Title 8, Section 219, Code of Alabama 1940. However, it is my opinion that the spirit and intent of such act should be considered and, if practicable, adhered to, in a situation as closely analogous thereto as the present. Hence my use of time and words in bringing to your attention the provisions of such act.

Premises considered, it is my opinion that the income derived from the lease of gas and oil rights to lands owned and operated by the Department of Corrections and Institutions should accrue to the benefit of the

Department and such money should be deposited to the account of the Department of Corrections and Institutions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 26, 1947.

Hon. Tom C. Garner,
Judge of Probate,
Jefferson County,
Birmingham 3, Alabama.

Taxation—Filing tax—Title 51, Section 618, Code of Alabama 1940.

Where, under the terms of a will, title to property vests in the trustee, a deed made by such trustee for the purpose of passing title to the property from the trustee to the beneficiary in accordance with the terms of the will is subject to the deed tax levied under the provisions of Title 51, Section 618, Code of Alabama 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of June 4, 1947, is as follows:

"Please advise us at your earliest opportunity, whether or not you think the enclosed deed is taxable. The lawyer handling this matter is very anxious to have it recorded, and is holding the matter up pending your decision."

The deed enclosed with your letter is in part as follows:

"KNOW ALL MEN BY THESE PRESENTS: THAT WHEREAS the will of Carrie Jordan Ware, dated August 28th, 1920, provided that the property designated as 2307 Avenue F and 601 South 23rd Street, Birmingham, Jefferson County, Alabama (which appears to be the property hereinafter described) should be given, devised and bequeathed to Birmingham Trust and Savings Company, as Trustee for Julia Ware Perdue, with the provision that the said Julia Ware Perdue should have the right and power at any time after the lapse of five years from the death of the said Carrie Jordan Ware to terminate the said trust by written direction or declaration of termination filed with the Trustee, and

"WHEREAS five years or more have elapsed since the death

of the said Carrie Jordan Ware, and the said Julia Ware Perdue has filed with the said Trustee a notice in writing that she elects to terminate the said trust;

"NOW, THEREFORE, for the purpose of carrying out the provisions of said will, the said Birmingham Trust National Bank (formerly Birmingham Trust and Savings Company) as Trustee under the will of Carrie Jordan Ware, deceased, does hereby grant, bargain, sell and convey unto the said Julia Ware Perdue all its right, title and interest in and to the following described real estate situated in the City of Birmingham, Jefferson County, Alabama, to-wit:"

It will be seen from the part of the deed quoted above (1) that under the terms of the will, title to the property was vested in the trustee, and (2) that the deed was made for the purpose of passing title to the property from the trustee to the beneficiary in accordance with the terms of the will.

In an opinion found in Quarterly Report of Attorney General, Vol. 1, p. 117, it was held that where the title to property was in the trustees, a deed from the trustees to the beneficiaries under the trust was subject to deed tax.

A deed executed by the executor under a will to carry out the provisions of the will, by which deed the legal title passes to the devisees, is subject to a deed tax. Quarterly Report of Attorney General, Vol. 8, p. 132. See also Quarterly Report of Attorney General, Vol. 6, p. 106; Quarterly Report of Attorney General, Vol. 16, p. 251.

Answering your inquiry, it is my opinion that the deed under consideration is subject to the deed tax levied under the provisions of Title 51, Section 618, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 26, 1947.

Hon. Roy D. Gist,
Chairman, Board of Revenue,
Jackson County,
Scottsboro, Alabama.

Sheriffs—Deputies — Jackson County — Counties — Courts of
County Commissioners—Act No. 209, Local Acts 1943, page 110.

1. The Board of Revenue of Jackson County has authority to pay the salary of a special deputy sheriff appointed by the sheriff under the provisions of Act No. 209, Local Acts 1943,

page 110, while attending the Federal Bureau of Investigation school in Washington, D. C.

2. The Board of Revenue of Jackson County is without authority to appropriate funds to pay the expenses of such deputy sheriff incurred in attending said school.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 1, 1947, is as follows:

"Will you please render your opinion on the following question:

"The Sheriff of Jackson County employs a special deputy sheriff under Local Act No. 209, S. 313, Page 110, Local Acts of Alabama 1943.

"Will it be legal for me as Chairman of the Board of Revenue of Jackson County to pay the special deputy's salary while he is off duty taking a special course in training at the Federal Bureau of Investigation school in Washington, D. C.?"

"Should your opinion be in the affirmative then will it be legal for the Board of Revenue to appropriate the sum of \$375.00 out of the General Fund of Jackson County to defray the expenses of the special deputy taking this special training?"

Act No. 209, Local Acts 1943, page 110, provides in pertinent part as follows:

"Section 1. That the Sheriff of Jackson County is hereby allowed an additional deputy to the deputies now provided by law, which said deputy shall receive a salary of Fifteen Hundred Dollars (\$1500.00) per annum, to be paid in twelve equal monthly installments out of the General Funds of said county; that the Sheriff of Jackson County shall appoint said deputy sheriff and deputy sheriff shall hold office at the pleasure of said Sheriff of Jackson County; that said deputy sheriff shall be eligible to perform the duties of deputy sheriff anywhere in said County of Jackson."

Under the provisions of the above statute, the sheriff of Jackson County is authorized to appoint an additional deputy sheriff who shall hold office at the pleasure of the Sheriff, and be paid a salary of \$1500.00 per annum by the county in twelve monthly installments.

Whether or not such deputy sheriff shall take a special training course at the Federal Bureau of Investigation school in Washington, D. C.,

is a matter within the discretion of the Sheriff and the Board of Revenue of Jackson County.

In answering your first inquiry, I assume that the Sheriff and the Board of Revenue consider it advantageous that the deputy attend such school. While attending such school, the deputy is performing duties under the direction of the Sheriff and the Board of Revenue.

In view of the above conclusions, it is my opinion that the Board of Revenue may legally pay the salary of such deputy sheriff while he is attending the Federal Bureau of Investigation school in Washington, D. C.

It has been long established in this State that counties are governmental agencies of the State, having only such powers as are granted to them by the legislature, and may not expend public funds unless there is a statute authorizing such expenditure. *Naftel v. County of Montgomery*, 127 Ala. 563, 29 So. 29; *Board of Revenue and Road Commissioners of Mobile County v. State*, ex rel. *Drago*, 172 Ala. 155, 54 So. 995; *State*, ex rel. *Towle v. Stone, County Treasurer*, 236 Ala. 82, 181 So. 218; *Quarterly Report of Attorney General*, Volume 9, page 35, Volume 39, page 97, Volume 35, page 19.

In answer to your second inquiry, it is my opinion that the Board of Revenue of Jackson County would be without authority to appropriate the sum of \$375.00 out of the general fund of Jackson County to defray the expenses of the deputy sheriff under consideration incurred in attending a special training course at the Federal Bureau of Investigation school in Washington, D. C. Act No. 209, supra, does not authorize the county to expend public funds for such a purpose, nor do I find any other statute authorizing the county to make such an expenditure.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 27, 1947.

General James S. Saliba,
Adjutant General of Alabama,
State Military Department,
Montgomery 2, Alabama.

Municipal Corporations—Assessments for Public Improvements—Exemptions—Title 35, Section 195, Code of Alabama 1940.

1. A municipal corporation is not authorized to levy an assessment against public property held by the Armory Commission of Alabama to pay the cost of construction of local improvements, such as street paving.

2. All property actually used for armory and military training purposes is exempt from all taxation, import or assessment.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion under date of April 4, 1947, is as follows:

"The State Military Department is in receipt of a letter from C. R. Wood, Dean, State Teachers College at Jacksonville pertaining to street paving. Mr. Wood states that the street on which the armory is located is to be paved, at a cost of 50 cents per front foot on each side of the street.

"He has requested a statement from this Department that the money to pay for the part in front of the armory will be available as soon as the paving has been completed.

"We would like to request an official opinion from your Department as to whether the City of Jacksonville can require the Armory Commission of Alabama (which owns the armory building) to pave their portion of the street in front of the armory. We are not familiar with the law, but we are under the impression that a City Ordinance cannot be enforced against the State of Alabama."

You inquire as to the authority of a municipality to levy upon public property, consisting of land upon which there is located a State armory, a special assessment for public improvements, in the instant case the paving of a street upon which the state-owned land abutts, further stating that such property to be owned and held by the Armory Commission of Alabama.

The Armory Commission of Alabama is a public corporation created by and under the authority of Title 35, Sections 186-202, Code of Alabama 1940. Such corporation is vested by statute with certain designated powers including the authority to construct or acquire by purchase, contract, lease, gift, donation, or condemnation, armories, buildings, or grounds suitable for drill instruction and administration and the safekeeping of public property. In any event the property so acquired becomes public property, owned, held by, and under the control and management of the Armory Commission of Alabama.

Title 35, Section 195, Code of Alabama 1940, provides, with respect to taxation of such property, as follows:

"All property actually used for armory and military training purposes as herein above defined, shall be exempt from all taxation, import or assessment."

It is, therefore, my opinion that the municipality in question is without authority to levy a special assessment for public improvements upon property owned by the Armory Commission of Aabama, if such property is actually used for armory and military training purposes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 30, 1947.

Honorable J. Troy Bozeman,
Superintendent of Education,
Colbert County,
Cherokee, Alabama.

Offices—Terms of—County Superintendents of Education—
Colbert County—Act No. 38, Local Acts 1931, page 11—Act No.
569, General Acts 1943, page 573.

1. Under Act No. 38, Local Acts 1931, page 11, the County Superintendent of Education of Colbert County elected at the general election of 1942 was elected for a term of four years, commencing December 15, 1942, and ending December 14, 1946.

2. Under Act No. 569, General Acts 1943, page 573, the term of office of the County Superintendent of Education of Colbert County elected at the general election of 1942 was extended from December 14, 1946, until July 1, 1947.

3. Under Act No. 38, supra, and Act No. 569, supra, the term of office of the County Superintendent of Education of Colbert County elected in the general election of 1946 commences on July 1, 1947, and continues for a period of four years.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 3, 1947, is as follows:

"I very earnestly request you to review the ruling made by Hon. James T. Hardin, Assistant Attorney General, to Hon. W. T. Archer, Chairman, Colbert County Board of Education, dated January 7, 1947, wherein he held that my term of office as County Superintendent of Education of Colbert County should begin upon October 1, 1947.

"I had contemplated that my term would begin July 1, 1947.

"After carefully reading this ruling of January 7, 1947, I am convinced that it is made upon the theory and upon the understanding that the incumbent, Mr. Robert Hudson, was elected on November 5, 1942 for a four year term beginning October 1, 1943 and that his predecessor, Mr. R. R. Porter, had been elected in the November election, 1938 for a term of four years expiring September 30, 1943. (Please note paragraph Two of the ruling of January 7, 1947.)

"I presume that the time of beginning and the time of ending of the terms of the various Superintendents who have been elected in our County since the passage of the Act of 1931 providing for an election will be governed entirely by the provisions of Local Act of 1931, page 11 and General Act of 1943, page 573.

"I am of the opinion that under the law (Local Acts, 1931, page 11, approved Feb. 17, 1931) Mr. Hudson, the incumbent, and his predecessor, Mr. Porter, were elected each time for a term of four years to begin as soon after the election as they could qualify, (the law granting forty days after the election within which to qualify) and that the term of Mr. Hudson, the present incumbent, expired immediately after the general election held November 5, 1946. However, I concede that it is probable that the effect of the General Act of the Legislature approved July 7, 1943 found in Acts of 1943, page 573, was to extend the term of Mr. Hudson, the incumbent, to July 1, 1947 which would make his term four years and about seven months to the end that there may be a uniform date for all the County Superintendents in the State to take office, but I do not understand by what reasoning his term should be further extended to October 1, 1947 which would seem to be in violation of the letter and spirit of both our Local Law approved February 17, 1931 and the General Law on the subject approved July 7, 1943 which seems to be the only statutes on the subject.

"Please permit me to call attention to the record of the elections for County Superintendent that have been held under our Local Law since its passage on February 17, 1931 and to call attention to some of the provisions of this Local Act which so far as I can determine has not been changed in any manner except insofar as the General Act of July 7, 1943 changes the date of the Superintendent's taking office. Our Local Law fixes the term to begin immediately after the election which would be not later than forty days after the election because by law there are only forty days allowed to qualify. The General Law passed July 7, 1943 fixes the time for the term to begin as July 1st following the election. It appears that our Local Law has not been in any manner changed except by the Act of 1943 and the change relates only to the beginning of the term of office. As I understand the facts, my taking office July 1, 1947 could not possibly shorten the incumbent's term but will in effect have extended it about seven months; that is, from November 5, 1946, the time of my election to July 1, 1947.

"Immediately after the approval of the Local Act of the Legislature which was February 17, 1931 (Local Acts of 1931, page 11) the Governor appointed Mr. Robert Hudson (who is also the present incumbent) as County Superintendent to 'serve until his successor is elected and qualified under the provisions of this Act.' (See Sec. 4 of the Local Act.)

"The first elected County Superintendent under the Act was Mr. Rufus R. Porter who was elected at the general election on November 6, 1934. You will note by reading section two of the Local Act that 'his term of office shall begin soon thereafter, as he qualifies and shall continue for four years thereafter or until his successor is elected and qualifies.' Mr. Porter qualified by making bond and taking the Oath of Office on December 15, 1934. It seems that then his term of office began to run and that it should have expired four years hence.

"Mr. Porter succeeded himself being reelected in the general election held on November 8, 1938. He did not make bond or take oath for the new term until September 30, 1939 whereas he should have qualified within forty days, but it does not seem that it was material as to when he actually qualified because he was already in office and succeeded himself. It seems that his second four year term began to run immediately after his election on November 8, 1938.

"Now, on or about August 1, 1942 Mr. Porter while serving his second term resigned and Mr. Robert Hudson (the present incumbent) was appointed to fill the unexpired term. Mr. Robert Hudson was again elected to the office at the general election held in November 1942 and thereby succeeded himself. I am not advised as to the date Mr. Hudson qualified for this new term, but I presume that it is not material because he succeeded himself and probably his new term began to run immediately after the election or certainly as soon as the forty days allowed by law for qualifying expired.

"At the general election held November 5, 1946 I was elected County Superintendent of Education of Colbert County. I made bond and took the Oath of Office on December 13, 1946. I have not yet assumed the duties of the office. I do not see how my taking office July 1, 1947 would shorten the term to which Mr. Hudson, the incumbent, was elected. I respectfully urge you to reconsider the former opinion dated Jan. 7, 1947 and hope that you will conclude that my term will begin on July 1, 1947. This is an important question because the changing of Superintendents after the budget and school program for the school year has been completed and the schools have started would be very confusing to all concerned.

"The Act of 1943 was evidently intended to make uniform the time for county superintendents throughout the State to take office,

thereby eliminating the handicap incident to changing superintendents after the school term has begun.

"Please kindly give me a ruling upon this question at your earliest convenience."

It is your request that I review the informal opinion of this office rendered under date of January 7, 1947, to Honorable W. T. Archer, Chairman, Colbert County Board of Education, wherein it was held that your term of office as County Superintendent of Education of Colbert County should commence upon October 1, 1947.

After carefully reviewing such opinion, I find that Mr. Archer's letter requesting the same presented an entirely different set of facts from those set out in your present inquiry. In his letter of December 14, 1946, Mr. Archer wrote as follows:

"Mr. Hudson was elected Superintendent of Education of Colbert County on November 5, 1942 by popular vote at General Election for a term of four years to begin Oct. 1, 1943. Prior to this, he was appointed County Superintendent by County Board of Education on August 18, 1942, to fill the unexpired term of Mr. R. R. Porter, who went into the United States Army and whose term expired September 30, 1943, to which he had been duly elected by popular vote."

You have now presented facts tending to refute the accuracy of the above statement with respect to the commencement and expiration of the terms of office of the respective holders thereof. Assuming, as I do, your facts to be true, it is apparent that a different conclusion must be reached from that expressed in the informal opinion addressed to Mr. Archer under date of January 7, 1947.

Since 1931, the election and term of office of the County Superintendent of Education of Colbert County has been governed by the provisions of Act No. 38, Local Acts 1931, page 11, which act provides as follows:

"Sec. 1. That the County Superintendent of Education of Colbert County, Alabama, shall be elected by the qualified voters of Colbert County, Alabama, in the same way and manner as other public officers are elected by the qualified electors of the County.

"Sec. 2. That the County Superintendent of Education of Colbert County, Alabama, shall be elected at the same time the Tax Collector and Tax Assessor are elected in Colbert County, Alabama, and his term of office shall begin soon thereafter, as he qualifies and shall continue for four years thereafter or until his successor is elected and qualifies. Each four years and at each time when the Tax Collector and Tax Assessor are elected in said County there shall be a County Superintendent of Education elected.

"Sec. 3. The Compensation, powers, duties and scope of service of the County Superintendent of Education of Colbert County shall be as is now provided by law, or as hereafter provided by law.

"Sec. 4. That immediately after the passage and approval of this Act, the Governor of Alabama shall appoint a County Superintendent of Education for Colbert County, Alabama, who shall serve until his successor is elected and qualified under the provisions of this act.

"Sec. 5. Qualifications of the County Superintendent of Education the election of which is provided for herein shall be as now fixed by the general law of Alabama or which may hereafter be provided for or fixed by the law of Alabama.

"Approved February 17, 1931."

Briefly tracing the history of the election and the term of office served by the County Superintendents of Education since the passage of the above act, as outlined in your letter, it is shown that immediately after the approval of the above act, upon February 17, 1931, the Governor, in accordance with the provisions of such act, appointed Mr. Robert Hudson as County Superintendent of Education of Colbert County to "serve until his successor is elected and qualified under the provisions of this act."

You likewise state that at the date of the general election of 1934 (November 6, 1934) Mr. Rufus R. Porter was elected to the office. Under the provisions of the above act, his term of office was to begin as soon after his election as he qualified for such office and was to continue for a period of four years, or until his successor was elected and qualified. You state that Mr. Porter qualified by making bond and taking the oath of office upon December 15, 1934. You fail to inform me as to whether Mr. Porter entered upon the duties of such office at that time. However, I feel this to be immaterial to the inquiry here considered, inasmuch as his term of office began with his qualification and his failure to enter upon the duties of such office at that time could in no way extend the term to which he was elected. Under the provisions of the above act, Mr. Porter, by qualifying upon December 15, 1934, established such date as the commencement of his term of office. It is likewise provided by said act that such term of office is to continue for four years, with the additional provision that such officer shall continue to hold office until his successor is elected and qualified. Therefore, it is my opinion that under the provisions of this act Mr. Porter's term of office legally extended from December 15, 1934, until December 14, 1938, with the added provision that he was to hold office until his successor was elected and qualified. Such a provision is known as a "hold-over" clause, and its purpose is to prevent vacancies occurring in public offices.

According to your letter, Mr. Porter, upon November 8, 1938, was re-elected as Superintendent of Education of Colbert County. By virtue

of such election, Mr. Porter became invested with the right to succeed himself in that office. However, you advise me that Mr. Porter did not qualify for this new term, by making bond and taking the oath of office therefor, until September 30, 1939, approximately eleven months later. The question therefore arises as to whether Mr. Porter, by failing to qualify for the office to which he was duly elected, vacated such office for the term to which he was elected upon November 8, 1938.

The County Superintendent of Education is required by law to give bond for the faithful performance of his duties, Title 41, Section 76, Code of Alabama 1940, providing in part as follows:

"The county Board of education shall fix and approve the official bond of the county superintendent of education which said bond shall be in a sum not less than three thousand dollars; * * *"

With regard to the time of filing such bond, Title 41, Section 45, Code of Alabama 1940, makes the following provision:

"In all cases such bonds must be filed in the proper office within forty days after the declaration of election, or after the appointment to office, except bonds of tax assessors and tax collectors which shall be filed on or before the first day of September next after their election or appointment."

The provisions of Title 41, Section 47, Code of Alabama 1940 are to the effect that failure to file such bond within the prescribed time vacates the office to which such person was elected. This statute is as follows:

"If any officer required by law to give bond fails to file the same within the time fixed by law, he vacates his office; and in such case, it is the duty of the officer in whose office such bond is required to be filed, at once to certify such failure to the appointing power, and the vacancy must be filled as in other cases."

It is pointed out in the case of *State ex rel. Bland et al. v. St. John*, 244 Ala. 269, 13 So. 2d 161, that it is an essential prerequisite to the "holding of office" by one elected thereto that he duly qualify for such office, and that until he does so qualify according to law, he has no more right to serve than any intruder would have. It would, therefore, follow that until such person filed the bond required, with the proper official, within the prescribed time, he could exercise no valid claim to the office to which elected. Likewise, under the provisions of Title 41, Section 47, supra, it is specifically provided that failure to file such bond within the prescribed time creates a vacancy in the office which may be filled by appointment by the appointing authority upon proper certification to such appointing authority of the failure to file such bond.

In the opinion delivered by the Supreme Court of Alabama in the case of *State ex rel. Foster v. Rice*, 230 Ala. 608, 162 So. 292, the court cited

the case of *State ex rel. Harris v. Tucker*, 54 Ala. 205, in which the court construed the provisions of the statute which is now Title 41, Section 47, Code of Alabama 1940, and made the following observation:

"... The holding was in effect that a failure of one duly elected to office to file the necessary bond within the time required by law creates a vacancy in the office to which he was elected, and that upon the proper certification of such fact to the appointing power, the duty devolved upon the latter to fill the vacancy as in other cases, just as the statute in express language requires. * *"

Continuing the court said:

"... The statute makes no reference to any cause for such failure, and, as observed in *State ex rel. Harris v. Tucker*, supra, failure to file * * * 'vacates the office.'"

"The language is plain, emphatic, and comprehensive. It includes all cases of 'failure to file' and no previous judicial investigation is necessary for certification or appointment. *State ex rel. Harris v. Tucker*, supra."

I am, therefore, of the opinion that Mr. Porter, by failing to file the bond required by law, within the time prescribed, forfeited his right to the office to which he was elected and vacated such office. I am also of the opinion that by filing the required bond approximately eleven months later he did not re-establish his right to such office. It has been held by our courts that the statute providing that a vacancy shall exist upon the failure to qualify is self-executing, and the vacancy can be filled without any previous judicial determination of facts. *State ex rel. Foster v. Rice*, supra; *State ex rel. Harris v. Tucker*, supra. And when the statute provides that for such a failure the office may be declared forfeited, the office cannot be restored to the intending incumbent by a subsequent execution of the bond. 46 C. J., Officers, Section 95; Biennial Report of Attorney General, 1934-36, page 227.

Be that as it may, however, Mr. Porter, as the incumbent, continued to hold office, no successor appearing to enter upon the duties of such office and no successor being appointed to fill the existing vacancy. Under the "hold-over" clause of Act No. 38, Local Acts 1931, supra, providing that such officer shall hold office "until his successor is elected and qualifies," Mr. Porter held office for a "reasonable" time to allow such successor to qualify and enter upon the duties of such office, in the instant case the period of forty days during which his successor was required to make and file his bond. However, in the case of *Prowell v. State ex rel. Hasty et al.*, 142 Ala. 80, 39 So. 164, the Supreme Court made the following statement:

"We regard it as the settled law of this State that the words 'until his successor is elected and qualified' was never intended to prolong

the term of office beyond a reasonable time, after the election, to enable the newly elected officer to qualify. *Hughes v. City Council of Montgomery*, 65 Ala. 201, 206-7; *Chelmsford v. Demarest*, 73 Mass. (7 Gray) 1."

It is, therefore, my opinion that after the expiration of this "reasonable" length of time Mr. Porter, no one appearing to enter upon the duties of such office nor to challenge his right thereto, continued to hold office as a de facto officer under color of his election to such office.

One distinction between an officer de facto and an officer de jure is that the former has only color of an appointment or election to the office, while the latter is in all respects legally appointed or elected and qualified to exercise the office, and has a complete legal title to the office as against the world. So far as the public and third persons are concerned there is no difference between an officer de facto and an officer de jure, the official acts of one being as valid and binding as those of the other. 46 C. J., Officers, Section 366.

Persons having color of title may be regarded as de facto officers, even though legally they are not eligible for the position. One elected or appointed to an office, who has failed to take the oath required, or to execute his bond within the time prescribed, or whose bond is irregular, is at least a de facto officer so that his acts are valid as to the public. 46 C. J., Officers, Section 370.

Certain it is that these facts in no way act to prolong or shorten the term of office to which Mr. Porter was elected upon November 8, 1938. The term of office to which he was elected was for four years, or until his successor was elected and qualified. The term of office to which he was elected at the date of the general election of 1934 expiring upon December 14, 1938, it is my opinion that the term of office to which he was elected upon November 8, 1938, began to run upon December 15, 1938, and continued for a period of four years thereafter; and whether he held such office as an officer de facto or as an officer de jure can in no way alter the term of office.

Neither does Mr. Porter's resignation of August 1, 1942, in any way affect or alter the term to which he was elected. It is prescribed by Title 52, Section 110, Code of Alabama 1940, that in the event of an appointment to fill a vacancy existing in the office of County Superintendent of Education, the appointee shall hold office for the unexpired term. Therefore, Mr. Hudson's appointment to this vacancy was only for the unexpired portion of the term of office to which Mr. Porter was elected on November 8, 1938, and did not extend until September 30, 1943, but only until December 14, 1942.

I am informed that upon the date of the general election of November 1942, Mr. Hudson was elected to the office of Superintendent of Education of Colbert County. I am not advised as to when Mr. Hudson qualified

for such office. However, such fact is not material to this inquiry, and at this late date can have no bearing thereon. The pertinent point for consideration is the term of office to which Mr. Hudson was elected and, in my opinion, such term of office was for a period of four years commencing December 15, 1942. Whether Mr. Hudson qualified for such office within the time prescribed and held such office as an officer de jure, or, failing to qualify within the prescribed time, held such office as an officer de facto can have no bearing upon the duration of the term of office to which he was elected. As stated, this term of office commenced December 15, 1942, and extended for a period of four years and until his successor was elected and qualified.

You state that upon November 5, 1946, you were elected to the office of County Superintendent of Education of Colbert County, and you make inquiry as to when your term of office is to commence. In any consideration of such question reference must be had to the provisions of Act No. 569, General Acts 1943, page 573, which act provides as follows:

"Section 1. That in counties in which the county superintendent of education is elected by popular vote, that the successful candidate shall take office on the July 1 following the date of his election; provided, however, that this act shall not operate to reduce the term of office of any incumbent of said office at the time of the effective date of this act, nor shall this act operate to reduce the term of office for which any person has been elected county superintendent of education who has not taken office at the time of the effective date of this act; provided further, that in any county in which the county superintendent of education has been elected at the general election in November, 1942, to take office for a four-year term beginning July 1, 1944, the successful candidate for the office of county superintendent of education in such county at the general election in November in 1946 shall hold office for a term of five years beginning with July 1, 1948, and his successor shall be elected for a four-year term at the general election in November in 1952, and thereafter every four years.

"Section 2. That all laws, general, special, and local, in conflict with the provisions of this act be and the same are hereby repealed.

"Section 3. If any part of this act shall be unconstitutional, the rest shall stand.

"Section 4. This act shall take effect immediately upon its approval by the Governor or its otherwise becoming a law.

"Approved July 7, 1943."

The purpose of such act, in my opinion, was to make uniform the date upon which elected County Superintendents of Education were to enter upon the duties of their respective offices, with the added provision

that the term of office of no incumbent should be shortened by virtue of the provisions of such act.

In my opinion, such act works as no bar to your entering upon the duties of County Superintendent of Education at the time prescribed by Act No. 569, supra, that is, July 1, 1947. As pointed out earlier herein, the term of office to which Mr. Hudson, your predecessor, was elected in 1942 was a four year term commencing December 15, 1942. Such term, therefore, would have expired in December 1946, but was extended to July 1, 1947, by Act No. 569, supra. This was within the province of the Legislature. *Walker County v. Barnett*, 247 Ala. 418, 24 So. 2d 665. Under the provisions of Act No. 569, supra, your assumption of the duties of such office has been postponed until July 1, 1947, but at such time you are rightfully entitled to such office and should enter upon the duties thereof.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

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